***United States Court of Appeals***

***for the***

***District of Columbia Circuit***

# TRANSCRIPT OF RECORD

754

BRIEF FOR APPELLANT AND JOINT APPENDIX

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 20,382

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FRANCES C. DEN,

*Appellant,*

v.

ALFRED A. J. DEN,

*Appellee.*

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Appeal from the United States District Court
for the District of Columbia

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# United States Court of Appeals

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**BRIEF FOR APPELLANT AND
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## I
## STATEMENT OF QUESTIONS PRESENTED

1. Whether the District Court has jurisdiction of an action brought by a resident of the District of Columbia, against a resident of the District of Columbia, seeking specific performance of a contract for maintenance and support, or, for damages of $250,000 for breach of said contract.

2. Whether, upon appellee's announcement of his intention to file a motion to dismiss the action for lack of jurisdiction, the appellant

(the plaintiff below) was properly denied the right to take appellee's deposition, notice thereof having been duly given in accordance with the rules.

3. Whether the trial court, upon determining that it lacked jurisdiction, properly granted appellee's motion for summary judgment, instead of his alternative motion to dismiss.

## II
## STATEMENT OF THE CASE

This is an appeal from an order granting appellee's motion for summary judgment and dismissing the action for lack of jurisdiction (JA 43).[1]

Appellee, the defendant below, did not answer the complaint, nor file any counteraffidavits to those filed by appellant in opposition to appellee's motion for summary judgment. Accordingly, the facts as alleged and stated are presently undisputed.

After more than 20 years of marriage and the birth of two children, the parties, both residents of the District of Columbia, and each acting upon advice of counsel, entered into a formal contract which, *inter alia*, provided for the maintenance and support of the wife (JA 6, Ex. A).

By the terms of this contract, the monthly amounts payable to appellant were subject to change from year to year, depending on variations in the amount of the appellee's adjusted gross income (JA 7, par. 2). This contract also required appellee to provide appellant with evidence of the amount of his adjusted gross income each year (JA 8, par. (e)), and that appellee pay the premiums and maintain in force a certain insurance policy (JA 11, par. 6).

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[1] References herein to the Joint Appendix are identified as "JA."

Thereafter, the parties were divorced, and the decree confirmed the parties' agreement for the wife's maintenance and support, and provided that it was not merged in the decree, but survived it in all respects (JA 3, par. 4).

Appellee remarried (JA 5, par. 8; JA 41), and thereafter arbitrarily reduced his monthly payments to appellant to less than one-third the amount payable under the terms of the aforesaid contract (JA 4, par. 5, 40), whereupon appellant instituted an action in the District of Columbia Court of General Sessions for a judgment for the amount of the arrearages (JA 4, par. 6).

Appellant was informed that appellee threatened that if she pursued the action and obtained a judgment against him, "she would never get another cent from him" (JA 37, par. 7).

Appellant obtained a judgment against appellee in the General Sessions Court action, and this judgment was paid (JA 4, 24), whereupon appellee terminated any further payments for appellant's maintenance and support, thus breaching the contract, and leaving appellant without any income with which to maintain herself or the family home. Appellee also failed to provide appellant with the evidence of his adjusted gross income for the year 1965, failed to inform appellant of his places of residence, and failed to pay the premiums on his insurance, all in breach of his obligations under their contract (JA 4, par. 7; JA 36).

Appellant thereupon instituted an action in the District Court praying that appellee be required to specifically perform his obligations as undertaken by him in the aforesaid contract, or, that judgment be entered as damages for breach of contract in the sum of $250,000.

At the time appellee discontinued further payments to appellant, he was obligated to pay her the sum of $1,000 per month, and on the basis of life expectancies, payments under this contract would have continued for another 19.5 years (JA 4-5, pars. 7, 10).

After service of the complaint and summons had been effected on appellee through the use of a special process server, appellee, through his present attorney, then tendered to appellant's attorney the amounts including interest, of the payments for the preceding three months, but appellant, being advised of appellee's plan to depart the jurisdiction, refused to accept these belatedly tendered payments in waiver of appellee's breach of contract (JA 28-30, Exs. 1, 2). Appellee continued to refuse to inform appellant of his whereabouts, continued to refuse to provide appellant with evidence of his adjusted gross income, and continued to refuse to pay the premiums on his insurance, all as provided for by the parties' contract (JA 36).

Although at the time the appellee's motion for summary judgment or to dismiss the action for lack of jurisdiction came on for consideration the trial judge had been apprised that appellee had departed the jurisdiction and was planning to leave the country (JA 32), but nevertheless he ruled: "I am of the opinion, and I am constrained to hold — I use that word advisedly — that the Court is without jurisdiction." The trial court thereupon entered an order granting appellee's motion for summary judgment (JA 43) after which notice of appeal was duly given by appellant (JA 44).

## ARGUMENT

### I. Equity Will Decree Specific Performance of a Contract for Maintenance and Support

Specific performance is now generally considered to be the proper remedy for breach of a contract for maintenance and support. This is succinctly expressed in 24 Am Jur 2d 1046, 1047, (Divorce and Separation, Sec. 919):

> ...courts of equity will enforce the payment of allowances agreed upon in valid separation agreements, both as to arrears and as to future payments.

This cited section further states:

> In theory the availability of an adequate remedy at law will preclude an action for specific performance of the terms of a separation agreement relating to matters other than support or alimony, but in practice it is generally found that there is no adequate remedy at law.

In *Zouck v. Zouck* (1954), 204 Md 285, 104 A 2d 573, 576, the court stated:

> ...traditionally equity has exercised jurisdiction as to separation agreements between husbands and wives and in appropriate cases has specifically enforced payment of maintenance including both that due and unpaid and that to be paid in the future.

In *Doerfler v. Doerfler* (1963) 196 A 2d 90, the District of Columbia Municipal Court of Appeals stated with approval the rule that specific performance applies to separation agreements, and denoted it as a more suitable remedy than a succession of actions for money judgments, and this court in *Rosenblum v. Rosenblum,* (1965) 210 A 2d 5, 8, cites *Zouck, supra,* with approval.

The general considerations which have led to the recognition of the inadequacy of a remedy at law in such cases, are dramatically emphasized in the pending case.

The appellant's action was filed after her former husband had failed to make any payments for her support for three months, thus leaving her without income. Pursuit of her remedy at law would have required that appellant incur the legal expenses of filing an action for judgment for the accumulated arrearages and somehow sustain herself without income until her case came on for trial. If the appellee's income continued at a level which would entitle appellant to $1,000 a month it would be necessary that she institute multiple suits at nine month intervals in order to remain within the jurisdictional limit of the General Sessions Court. The alternative would be that she permit the arrearages

to accumulate for more than ten months, bring her action at law in the District Court, and somehow sustain herself without income until her case was reached for trial on a crowded calendar.

And in each of these periodic, multiple suits at law, appellant would be without the means of requiring appellee to comply with his contractual obligation to provide evidence of his adjusted gross income upon which her right to support is geared. Nor could multiple actions at law assess the damages for appellee's failure to keep his insurance in force, as provided for by the subject contract.

But the limitations on the adequacy of the remedy at law which would be present if appellee had remained in the jurisdiction and available for service of process in successive actions at law, had become insurmountable obstacles by the time that the matter came on for consideration by the trial court, for it was then a matter of record in the case that appellee, in furtherance of his threat that appellant would never get another cent from him, had fled this jurisdiction to an undisclosed address, notwithstanding his contractual obligation to keep appellant informed of his places of residence.

Should this Court sustain the dismissal of this action for lack of jurisdiction, appellant will be faced with the impossible task of tracing the appellee, and when he is located, prosecuting an action against him in a foreign tribunal, wherever he may be. She would be subjected to these substantial expenses at a time when she is receiving nothing for her maintenance and support.

Appellant's plight sharply emphasizes the correctness of the general recognition of the inadequacy of an action at law as a remedy for breach of a support agreement, and emphasizes justification for the granting of equitable relief in such cases.

## II. The Trial Court Erred in Dismissing This Case for Lack of Jurisdiction.

The primary prayer of appellant's complaint was for the equitable remedy of specific performance of the contract for her maintenance and support, with the alternative demand for damages for breach of contract in the amount of $250,000, calculated on the basis of the shorter life expectancy of the parties at the rate of $1,000 per month — the monthly amount payable by the terms of the agreement at the time of the filing of the action.

When the action was commenced, both parties had long been residents of the District of Columbia, and appellee was personally served with the summons and complaint at his office in the District of Columbia.

The jurisdictional statute, Title 11-521, District of Columbia Code, Suppl. V, 1966, in pertinent part provides:

> (a) Except in actions or proceedings over which exclusive jurisdiction is conferred by law upon other courts in the District, the United States District Court for the District of Columbia, in addition to its jurisdiction as a United States District Court . . . has original jurisdiction of all:
>
> (1) Civil actions between parties where either or both of them are resident or found within the District. . .

As to the proceedings over which exclusive jurisdiction is conferred by law on the District of Columbia Court of General Sessions, Title 11-961(a) of the Code provides:

> In addition to other jurisdiction conferred upon it by law, the District of Columbia Court of General Sessions has exclusive jurisdiction of civil actions, . . . in which the claimed value of personal property or the debt or damages claimed does not exceed the sum of $10,000, exclusive of interest and costs.

Immediately following, Title 11-962 provides for the certification by the District Court to the General Sessions Court for trial of civil actions,

where it does not appear that the action will justify a judgment in excess of $10,000. This statute expressly excepts from the District Court's right of certification of such cases, "an action for equitable relief."[2]

This restriction on the District Court's authority to transfer actions for equitable relief to the General Sessions Court, accords with the many cases which recognize that the jurisdictional statute does not confer on the General Sessions Court any primary or general equity jurisdiction, and that its equity powers are limited to the administration of justice in those cases which are within the exclusive jurisdiction of the General Sessions Court. *Sambataro v. Caffo*, 57 App D C 260, 20 F 2d 276, *Friedman v. District of Columbia*, 155 A 2d 521, 523. In *Scherherazade v. Markikian*, (1958) 143 A 2d 512, the primary purpose of the action was to obtain equitable relief — an injunction against the use of a trade name, with damages alleged in the sum of $3,000. On appeal, and notwithstanding the fact that the amount of damages alleged were within the monetary jurisdiction of the General Sessions (Municipal) Court, the action was dismissed for lack of jurisdiction. The court, referring to the General Sessions Court's jurisdictional act, stated (143 A 2d, at p. 513): "Nowhere in the Act is there an express grant of equity power to the court." It is thus evident that had the appellant brought this action in the General Sessions Court it would have been dismissed for lack of jurisdiction because the primary relief sought was equitable in nature, and because the amount of damages claimed as an alternative was in excess of the jurisdictional limit of that court.

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[2] The Federal Rules of Civil Procedure by the adoption of the generic term "civil action" have not changed the historic differentiation between equitable and legal doctrines, and between equitable and legal remedies. Byram v. Vaughn (Dist. of Col., 1946) 68 F Supp. 981, 19 F R Serv. 2.22, case 1, cited with approval in Stainbeck v. Mo Hock Ke Lok Po, 336 U S 380, 382, 93 L Ed 743, 751.

Appellant's secondary demand for a money judgment for the material breach of the support contract did not serve to convert appellant's action from a prayer for equitable relief, into an action at law. If appellant had not requested this secondary form of relief a court of equity would nonetheless have had the inherent power to enter a money judgment if it was found that the equities did not warrant an order for specific performance. *Emerich v. McNeil,* 75 U S App D C 307, 309, cites with approval the decision in *McGowan v. Parrish,* 237 U S 285, 35 S Ct 543, 59 L Ed 955, 963 (an appeal from the District of Columbia Court of Appeals) which states:

> ...a court of equity ought to do justice completely and not by halves; and a cause once properly in a court of equity for any purpose will ordinarily be retained for all purposes, even though the court is thereby called on to determine legal rights that otherwise would not be within the range of its authority.

Thus, it is immaterial in considering the jurisdictional question, whether appellee's failure to make any payments for some three months entitled her to recover damages for a total breach, or whether, as appellee has contended, she was limited in her recovery of a money judgment to the amount of the accrued, defaulted monthly payments.

The District Court had exclusive jurisdiction of appellant's petition for equitable relief, and this jurisdiction may not be defeated by pre-judgments of the likelihood of the amount of money damages which appellant might prove in the trial of her case on the merits. *Scherherazade v. Markikian, supra.* Even if the question of appellant's provable money damage were material to the resolution of the jurisdictional question, the appellant's demand, having a reasonable basis, would control and her action should not have been dismissed by a pre-judgment of the monetary value of an unliquidated claim. *Deutsch v. Hewes Street Realty Corp.* (C C A 2 Cir., March 30, 1966) 359 F 2d 96.

Thus, the trial court had jurisdiction, whether the case is regarded as invoking the court's inherent equity powers, or as grounded on an action for breach of contract between residents of the District of Columbia.

### III. The Trial Court Erred To Appellant's Prejudice by Vacating Her Notice of the Taking of Appellee's Deposition.

Appellant, more than 20 days after the filing of the action, gave due notice to appellee's attorney of the taking of appellee's deposition on oral examination (JA 16). Thereafter, upon being advised by appellee's attorney that this notice was defective and would not be honored because appellee's attorney had not yet entered his appearance in this case, appellant thereupon issued a new notice to appellee (JA 18). The defendant-appellee moved to vacate the notice of deposition, urging as the principal ground, that he planned to file a motion to dismiss the complaint for failure to state a cause of action within the jurisdiction of the court (JA 17, par. 2), and appellee's motion was granted, the examination of the defendant was suspended (JA 33) and appellant was denied the opportunity to discover facts, such as the amount of appellee's adjusted gross income, and other facts pertinent to the merits of her prayer for equitable relief, and to the resolution of the jurisdictional issues raised by the appellee-defendant. *Urquart v. American LaFrance Co.*, 79 App D C 219, 221.

Appellant's notice of the taking of the deposition was duly and properly given in accordance with the provisions of Rule 26(2), Federal Rules of Civil Procedure, and there having been no delay in the delivery of the complaint and summons for service on the defendant-appellee. *Caribbean Const. Co. v. Kennedy Van Suan Corp.*, 13 F R D 124, 17 F R Serv. 26a2, case 3.

The appellee's stated intention of filing a motion challenging the jurisdiction of the court was not a proper ground for denying the right of appellee's examination, for even if such a motion had been filed and was pending for disposition, the moving party would have been entitled to take the deposition, as noticed. *Silk v. Seiling*, 10 F R Serv. 26a 12, case 1; 7 F R D 576; *Savage v. Isthmian S. S. Co.*, 9 F R Serv. 26a 12, case 1, 6 F R D 311.

## IV. Upon Determining That It Lacked Jurisdiction, the Court Should Have Entered an Order of Dismissal and Not an Order of Summary Judgment.

The point which appellant brought to the attention of the trial court by her motion filed on June 13 to reconsider and correct the order for summary judgment (JA 2) is that the entry of a summary judgment for appellee implies a decision on the merits which may be pleaded as res judicata in further proceedings.

Barron and Holtzoff, Federal Practice and Procedure (Wright ed.) vol. 1A, ch. 1240, p. 186, states:

> [If] the court has no jurisdiction, it has no power to enter a judgment on the merits but must dismiss the action. Therefore it is error for a district court to enter a summary judgment for defendant on the ground of lack of jurisdiction.

The recognition of a summary judgment as an adjudication on the merits is noted under the interpretations of Rules 41(b) and 56, Federal Rules of Civil Procedure. See, for example, *Martucci v. Mayer*, 210 F 2d 259, *Moffett v. Commerce Trust Co.*, 87 F Supp 438, *aff'd* 187 F 2d 242, *cert. den.* 342 U S 818.

In the event that it should become necessary for the appellant to proceed against the appellee at some future date in a foreign jurisdiction, it is important that the assertion of her rights under this contract not be prejudiced, by permitting a defense of res judicata to be interposed, based on the entry of a summary judgment in the pending case, and the order of the lower court should be entered as an order of dismissal for lack of jurisdiction, and not as a summary judgment for appellee.

## CONCLUSIONS

Appellant's action was within the jurisdiction of the District Court and it was error to summarily dismiss it.

Appellant's rights were prejudiced by denial of the right of oral examination of appellee, notice thereof having been duly given in accordance with the rules.

The order entered by the lower court, upon determining that it lacked jurisdiction, should have been for dismissal of the action, and not for summary judgment for appellee.

Respectfully submitted,

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JOINT APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

| | | |
|---|---|---|
| FRANCES C. DEN<br>4514 Brandywine Street, N.W.<br>Washington, D. C.<br>Plaintiff | ) | |
| v. | ) | C. A. No. 862-'66 |
| ALFRED A. J. DEN<br>The Savoy<br>1101 New Hampshire Avenue, N.W.<br>Washington, D. C.<br>Defendant | ) | |

RELEVANT DOCKET ENTRIES

| Date | Proceedings |
|---|---|
| 1966 | |
| Apr. 1 | Complaint, appearance, Exhibit A. filed |
| Apr. 1 | Summons, copies (1) and copies (1) of Complaint issued. Ser. 4/11/66 |
| Apr. 1 | Motion of Pltf. for appointment of Special Process Server; Affidavit. filed |
| Apr. 1 | Order appointing Hugh W. Duffy as special process server, (N) Mc Garraghy, J. |
| Apr. 22 | Notice by plaintiff to take deposition of defendant; c/m 4/21/66. filed |
| May 2 | Motion of defendant for extension of time to answer complaint; points and authorities; c/m 5/2/66; M.C. 5/2/66. filed |
| May 2 | Motion of defendant to strike and vacate notice to take defendant's deposition; points and authorities; c/m 5/2/66; M.C. 5/2/66; appearance Warren E. Magee. filed |
| May 6 | Notice by plaintiff to take deposition of defendant; c/m 4/25/66. filed |
| May 6 | Opposition of plaintiff to motion to strike and vacate notice to take or continue defendant's deposition; points and authorities; c/m 5/5/66. filed |

| Date | Proceedings |
|---|---|
| May 13 | Motion of defendant to dismiss, or in the alternative for summary judgment; affidavit, statement; points and authorities; c/m 5/13/66; M.C. 5/13/66. filed |
| May 13 | Order extending time for defendant to file answer until May 18, 1966. (N) McGarraghy, J. |
| May 18 | Order suspending taking of deposition of defendant until Court acts on defendant's motion to dismiss. (N) McGarraghy, J. |
| May 20 | Motion of plaintiff for declaratory judgment; exhibits (3); points and authorities; c/m 5/20/66; M.C. 5/20/66. filed |
| May 20 | Affidavit and supplemental affidavit of plaintiff in support of attachment before judgment. filed |
| May 23 | Opposition of plaintiff to motion to dismiss or for summary judgment; affidavit; exhibit I; statement; exhibits A and B; points and authorities; c/m 5/21/66. filed |
| May 23 | Bond in attachment before judgment in amount of $8,500.00 by plaintiff with Hartford Accident and Indemnity Co. approved. McGarraghy, J. |
| May 27 | Attachment before judgment, writs (3) interrogatories (3) issued; deposit by Paul M. Rhodes, $3.00. Paul M. Rhodes, Garnishee served 5/27/66. deft. served 6/8/66 |
| May 27 | Answer of garnishee to interrogatories. filed |
| May 31 | Opposition of defendant to motion of plaintiff for summary judgment, attachment before judgment and declaratory judgment; c/m 5/27/66. filed |
| June 3 | Order denying plaintiff's motion for declaratory judgment and for attachment before judgment and declaratory judgment; granting defendant's motion for summary judgment; entering judgment in favor of defendant and dismissing complaint; declaring defendant's motion to dismiss as moot. (N) (Signed: June 2, 1966) McGarraghy, J. |
| June 13 | Motion of plaintiff to reconsider and correct order for summary judgment; points and authorities; c/m 6/13/66; M.C. 6/13/66; appearance of Frances H. Goodwin. filed |
| June 21 | Opposition of defendant to motion of plaintiff to reconsider and correct order for summary judgment; c/m 6/21/66. filed |
| June 22 | Order denying motion of plaintiff to reconsider and correct order for summary judgment. (N) McGarraghy, J. |
| June 29 | Notice of appeal by plaintiff from order of June 3, 1966; deposit by Rhodes $5.00. (copy to Warren E. Magee) filed |

| Date | Proceedings |
|---|---|
| July 19 | Designation of transcript and statement of points; c/m 7/19/66. filed |
| July 19 | Transcript of hearing, May 17, 1966 on motions. (Reporter Ida Z. Watson) (Attorney's copy) filed |
| July 22 | Partial transcript, 5/17/66 and 5/31/66. (Reporter Ida Z. Watson) (Court's copy) filed |

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[Filed 4/1/66]

**COMPLAINT FOR SPECIFIC PERFORMANCE OR FOR DAMAGES FOR BREACH OF CONTRACT**

Plaintiff respectfully represents as follows:

1. This Court has jurisdiction of the within cause under Title 11-306 of the District of Columbia Code. The amount claimed as damages, exclusive of interest and costs, exceeds the sum of $10,000.00. Plaintiff and defendant on June 28, 1963 were, and now are, residents of the District of Columbia.

2. Plaintiff and defendant were married to each other on, to wit, August 10, 1940, and of the marriage two children were born; Patricia Carolyn Den (now Mrs. Edwin Greeves), on January 4, 1943, and Laurence Edwin Den, on October 9, 1947.

3. On, to wit, June 28, 1963, plaintiff and defendant, each then being represented by counsel, entered into a fair, equitable and valid written contract providing for a settlement of the property rights of the parties, the education of the children, and the maintenance and support of the plaintiff, a copy of which is attached as Exhibit A and made a part hereof.

4. On or about July 3, 1963, the parties were divorced in the Circuit Court, Marion County, Alabama (Equity Case No. A356) and the decree entered in said proceedings, referring to the contract which is attached as Exhibit A, provided:

"4. That the agreement between the parties as set forth in paragraph 4 of the Bill of Complaint and dated June 28, 1963, is hereby confirmed and the parties shall keep and abide by the terms thereof; however, the same is not merged in this decreee but shall in all respects survive this decree."

5. The agreement of June 28, 1963 (Exhibit A hereto) was performed, substantially, by the parties until January, 1965, when defendant acting through his attorney, by letter dated January 12, 1965, notified plaintiff that the defendant was "presently financially unable to continue the support payments as set out in the separation agreement signed by you." Notwithstanding that by the terms of the said agreement defendant was, on the basis of the amount of his adjusted gross income, obligated to then pay $1,000 each month for plaintiff's support, he arbitrarily reduced the payments to $500 a month and later to $300 a month, all without plaintiff's agreement or consent.

6. On March 5, 1965 plaintiff instituted an action against defendant in the District of Columbia Court of General Sessions (Case No. GS 4510-65) for judgment for defendant's arrearages in payments. On February 16, 1966, the second day of trial of said case, defendant Alfred A. J. Den, confessed judgment in the full amount of the arrearages claimed for the months January, 1965 to January, 1966, inclusive, in the sum of $7,700, plus interest, which judgment was paid and satisfied by defendant on February 25, 1966.

7. Defendant's adjusted gross income for the tax year 1964 was at least $28,715.60, by reason of which defendant, by the provisions of paragraph 2 of the agreement (Exhibit A hereto) was obligated to pay to plaintiff for her maintenance and support the sum of $1,000 on February 1, 1966, and the sum of $1,000 on March 1, 1966, but defendant has paid plaintiff nothing for her maintenance and support for February or March, 1966, and plaintiff has no other income from which to maintain and support herself and provide a home for their minor son, Laurence.

8. Plaintiff is informed, believes, and believing avers that defendant is remarried and that he has announced his intention of disposing of his medical practice and removing himself from the District of Columbia to avoid having to make any further payments to plaintiff for her maintenance and support.

9. Defendant is financially well able to provide for plaintiff's maintenance and support according to the terms of the June 28, 1963 agreement, defendant's adjusted gross income for tax purposes for the past six years having been as follows:

| | |
|---|---|
| 1959 | $37,076.16 |
| 1960 | 28,790.22 |
| 1961 | 37,247.23 |
| 1962 | 30,829.94 |
| 1963 | 36,404.91 |
| 1964 | 28,715.60 |

10. Plaintiff was born on July 29, 1908, defendant on May 21, 1911, and according to published actuarial tables plaintiff now has a life expectancy of at least 23.5 years, and defendant now has a life expectancy of at least 19.5 years.

11. Defendant's total breach of his contractual obligations to plaintiff by his failure to pay her anything for her maintenance and support for the months of February and March, 1966, was willful, malicious, without just cause, and in wanton disregard of his legal and moral obligations. Plaintiff has heretofore availed herself of her remedy at law for defendant's partial breach of this contract, as set forth in paragraph 6 above, but the entry of judgment in that proceeding has not resulted in defendant's performance thereafter of his obligations under the subject contract (Exhibit A hereto) and plaintiff's further assertion of her remedy at law will involve multiple suits, will necessitate plaintiff assuming the obligation to pay counsel fees and legal costs, and will leave her without income during periods of default with which to meet her continuing expenses and the costs of maintaining her home, as a result of which plaintiff has no adequate and complete remedy at law.

WHEREFORE, the premises considered, plaintiff prays (1) that this Court in the exercise of its equity powers retain jurisdiction of this cause and order and require defendant to specifically perform his obligations as undertaken and assumed by him in his June 28, 1963 contract with plaintiff (Exhibit A hereto), or (2) that judgment be entered for plaintiff against defendant as damages for breach of contract in the sum of Two hundred fifty thousand Dollars ($250,000), and costs, and that defendant be required to pay a reasonable fee for the services herein of plaintiff's attorney.

/s/ Frances C. Den
FRANCES C. DEN

[Jurat]

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**EXHIBIT A**

THIS AGREEMENT, made this 28 day of June, 1963, by and between ALFRED A. J. DEN (hereinafter referred to as the "Husband"), and FRANCES CHARLOTTE DEN (hereinafter referred to as the "WIFE"):

WITNESSETH:

WHEREAS, the parties hereto were lawfully married at Marlboro, Maryland, on August 10, 1941 and two children have been born of this marriage, namely, Patricia Carolyn, born January 4, 1943 and Laurence Edwin, Born October 9, 1947 (hereinafter sometimes collectively referred to as the "children"); and

WHEREAS, the parties are now and have been voluntarily living separate and apart and there is no expectation of a reconciliation; and

WHEREAS, the parties hereto desire to adjust and agree upon their respective rights and obligations, and to provide for the maintenance and support of the wife and for the custody, support and maintenance of the children; and

WHEREAS, each party is represented by counsel;

NOW, THEREFORE, in consideration of the mutual promises, agreements and covenants herein contained, the parties agree as follows:

1. No Interference. The Husband and Wife shall continue to live separate and apart from each other, and each shall be free from interference, authority and control by the other, as fully as if he or she were single and unmarried, and each may conduct, carry on and engage in any employment, business or trade which to him or her shall seem advisable, at such place or places as he or she may from time to time choose, for his or her own sole or separate use and benefit, free from any control, restriction or interference, directly or indirectly from the other party. Neither of the parties shall interfere with the other in his or her respective liberty of action or conduct, and each agrees that the other may at any and all times reside and be in such place and with such relatives, friends and acquaintances as he or she may choose, and each party agrees that he or she will not molest the other or compel or seek to compel the other party to cohabit or dwell with him or her.

2. Support to Wife

(a) The Husband agrees to pay to the wife, for her support and maintenance, the sum of $950.00 per month, payable on or before the first day of each month, commencing with the first day of the month following execution of this agreement. When the payment to the wife for the support and maintenance of Patricia ceases under the provisions of paragraph 3(b) hereof, the Husband shall increase the payment for the support and maintenance of the wife to $1,000.00 per month.

(b) In addition to the payment set forth above, in the event that the Husband's "adjusted gross income" as shown in his Federal income tax return for the calendar year 1963 or any subsequent calendar year shall exceed the sum of $35,000, he shall pay to the Wife on or about April 30 of the following year for her own support and maintenance a sum equal to twenty percent (20%) of so much of such income as in excess of $35,000, but is not in excess of $45,000 for such year.

(c) In the event that the Husband's "adjusted gross income" as shown in his Federal tax return for the calendar year 1963 or any subsequent calendar year shall be less than $25,000, the payments provided for in paragraph 2(a) hereof shall be reduced for the succeeding year by an amount equal to twenty percent (20%) of the difference between such income for such prior year and $25,000, the total reduction to be prorated over the twelve monthly payments in such succeeding calendar year.

(d) All payments for the support and maintenance of the Wife provided for in paragraphs 2(a) and 2(b) hereof shall cease and terminate in the event of her remarriage.

(e) On or before April 30 of each year, commencing with April 30, 1964, the Husband shall deliver to the Wife a true copy of his Federal income tax return for the preceding calendar year. In the event any amendments or deficiency notices or statements are filed or received by the Husband with respect to any Federal income tax return, a copy of which shall have been delivered to the Wife as aforesaid, a copy of each such amendment, deficiency notice or statement shall be delivered by the Husband to the Wife promptly after such filing or receipt. Such copies of returns or other documents shall be furnished, as above specified, so long as the Husband shall be required to make payments pursuant to paragraph 2(a) hereof; provided, however, that if the parties are divorced and the Husband remarried, he shall deliver to the Wife, in lieu of a copy of any joint income tax return filed by him, a sworn statement of his own adjusted gross income for the year covered by such joint return.

3. Custody, Support and Maintenance of the Children.

(a) The Wife shall have custody of the children of the parties with the right of the Husband to see them and visit with the children away from the Wife's home at reasonable times. In addition to the above, the Husband shall have the right to have Laurence with him for a period of one month during the summer of each year, the specific dates of such period to be

agreed upon by the Husband and Wife. During such one month period as aforesaid, the payment to the Wife for the support and maintenance of Laurence as provided for herein shall abate by fifty percent (50%).

(b) On or before the first day of each month, commencing with the month following the execution of this agreement, the Husband shall pay to the Wife for the support and maintenance of each of the children, the sum of $75.00 per month, until such child reaches the age of 21 years, or marries, or dies, whichever first occurs; provided, however, that when Patricia reaches the age of 21 years or marries, or dies, the Husband shall increase to $100.00 per month such payment for the support and maintenance of Laurence; provided, further that in the event the parties are divorced and the Wife remarries, such payment for support and maintenance of Laurence shall be $300.00 per month.

(c) In the event that any child shall need medical treatment, the Wife shall, when practical, consult with the Husband with respect to the selection of doctors, hospitals and other related matters to the extent that circumstances reasonably permit.

4. Education of Children

(a) In addition to the payments provided for in paragraphs 2 and 3 hereof, the Husband shall pay all expenses for tuition, room and board incurred by Patricia at Pennsylvania State University or at any other college or university approved by the Husband until completion of her undergraduate course and shall also pay to Patricia an allowance of $40.00 per month during the academic year. The Husband shall also pay the tuition expense of Laurence at St. Johns College, Washington, D. C. or any other preparatory school approved by the Husband, and the tuition expense of Laurence for any undergraduate and any graduate course at any college or university approved by the Husband. Such obligation to pay Laurence's tuition expense shall survive the Husband's death and shall be binding on his estate.

(b) The Wife shall consult with the Husband with respect to the schools which the children shall attend and other matters affecting their education, religious training, health and general welfare.

(c) All payments made for the benefit of each child under paragraphs 3 and 4 hereof shall be deemed to have been made for the support of such child. The Husband shall be entitled to claim Patricia as a dependent on his income tax returns; the Wife shall be entitled to claim Laurence as a dependent on her income tax returns, provided, that if the Wife remarries, the Husband shall claim Laurence as a dependent in the year in which such marriage occurs and for all subsequent years, so long as the same shall be consistent with the facts necessary to establish dependency under the Internal Revenue Code.

(d) The Husband and Wife, by written agreement, may renegotiate or modify the provisions of this agreement relating to the custody, support, maintenance and education of the children without the appointment of, reference to or agreement by any other person, general or special guardian, or the children individually.

5. Division of Property

(a) Transfer of Real Property. The Husband has transferred to the Wife, by deed executed and acknowledged simultaneously with the execution of this agreement, the real property which was the former home of the parties and in which the Wife now resides (known as premises 2932 Garfield Terrace, N. W., Washington, D. C.), subject to the outstanding mortgage and subject to all covenants and restrictions of record. The Husband shall not be obligated to make any payments with respect to this property or its maintenance or with respect to the mortgage thereon. The Wife hereby indemnifies and holds harmless the Husband against any liability for payments on said mortgage and, in the event the Wife shall default in making such payments, the Husband may make such payments and deduct such amount from the next earliest payment due the Wife under this agreement.

(b) Division of Personalty. The Wife shall have title to and possession of all the furniture, furnishings, household goods, equipment, etc. in and around her residence at 2932 Garfield Terrace, N. W., Washington, D. C. The 1963 Pontiac Tempest automobile shall belong to the Wife. The 1962 Cadillac automobile shall belong to the Husband. The Husband

shall have the right to remove from the Wife's residence his personal papers, books, fishing equipment and other personal effects.

(c) Hereafter, each party shall own, free of any claims by the other, all items of property of every kind which are now owned or which may hereafter be acquired by him or her, and each party shall be free to dispose of the same as fully and effectively as if he or she were unmarried.

6. Life Insurance. The Husband represents that the Wife has been irrevocably designated as the primary beneficiary and the children as the contingent beneficiaries of the sum of $20,000 in insurance policy number 1939573 issued on the life of the Husband by the New England Mutual Life Insurance Co. in the face amount of $25,000.

The Husband agrees (a) to maintain the aforesaid policy in full force and effect and to pay the premium thereon, (b) not to borrow on said policy or otherwise encumber it, and (c) to furnish the Wife with proof of premium payments, if requested. In the event the Husband defaults in payment of the premiums on such policy, the Wife shall have the right to pay such premiums and to obtain reimbursement from the Husband.

7. Health Insurance. The Husband shall maintain in full force and effect a hospitalization insurance policy for the benefit of each child until such child reaches the age of 21 years, dies or remarries, whichever first occurs, and for the benefit of the Wife so long as the parties are married.

8. Country Club Privileges. So long as the Husband shall continue to hold a membership in the Columbia Country Club, (a) the children shall have the right to use the club facilities and the Husband shall pay expenses incurred by the children for themselves at such club, and (b) the Wife shall have the right to use club facilities until either the Husband or the Wife remarries, whichever remarriage first occurs, provided, that she shall pay all expenses she incurs at such club. The Husband shall not be liable for expenses of guests of either the Wife or children.

9. Wife's Debts. The Wife represents that Schedule A annexed hereto contains a complete list of all debts incurred by the Wife for which the

Husband may be chargeable. The Husband shall promptly pay and discharge all of these debts. Simultaneously with the execution of this agreement the Husband has paid to the Wife the sum of $113.84 to reimburse her for payments she had made of the accounts listed in Schedule B annexed hereto and the Wife waives her right to reimbursement for any other debts she has paid. The Wife shall not, at any future time, contract any debt for which the Husband may become liable and the Wife shall keep the Husband indemnified against all such debts.

10. Counsel Fees. The Husband agrees to pay Armand Newmyer, Esq., attorney for the Wife, the sum of $3,500 as payment in full for legal services rendered to the Wife in connection with the negotiation and preparation of this agreement.

11. Husband's Death. Except as otherwise provided herein, all payments required to be made by the Husband under this agreement shall terminate upon his death, provided, that payments for the support and maintenance of the Wife under paragraph 2(a) hereof and for the support and maintenance of the children under paragraph 3(b) hereof shall be made for 90 days after the Husband's death and shall be a charge against his estate.

12. Income Tax Returns. The parties hereto have heretofore filed joint Federal and District of Columbia income tax returns and have filed joint declarations of estimated tax for the year 1963. In order to adjust their respective tax liabilities, it is agreed as follows:

(a) The Husband shall be entitled to take the entire credit on his 1963 Federal and District of Columbia income tax returns for all estimated tax payments made under the joint declaration for 1963.

(b) Each party shall have the right to file a separate declaration of estimated tax for 1963.

(c) In the event any assessment is made for Federal or District of Columbia incomes taxes for any year prior to 1963, the assessment shall be paid entirely by the Husband. The Husband shall have the sole right to defend or resist any such assessment and shall bear all costs and expenses of such action.

(d) In the event any refund is received of Federal or District of Columbia incomes taxes for any year prior to 1963, the full amount of the refund shall belong to the Husband. The Husband shall have the sole right to institute and prosecute all such claims or actions for refund.

(e) In the defense of any proceeding to assess any tax liability, or in the institution or prosecution of any claim or action for refund for any year prior to 1963, the Husband shall have the right to use the name of the Wife to the extent permitted by law.

(f) The parties agree to cooperate to the fullest extent and to execute for each other any other instruments requested by their respective counsel, and to exchange and supply information or furnish testimony, in order to carry out the intention of this arrangement.

13. Mutual Releases. The Husband and Wife hereby mutually waive and release each other and bar themselves from any and all claims or rights of dower, curtesy and/or statutory share in and to any and all real property or interest therein, now owned or that may be hereafter acquired by either of the said parties. The parties do further waive, release and relinquish all rights, title and interest whatsoever that either may have in the event of the other's death, legally as surviving husband or widow or distributee in any estate, real, personal or mixed, of which either may die seized, possessed or in any manner entitled; and each of the parties does hereby elect and expressly covenant and agree to accept the provisions herein contained in lieu of any right of curtesy, dower and of all legal and statutory share as surviving husband, widow, distributee or otherwise, in any real or personal estate of which either the Husband or Wife respectively may die seized or possessed or in any wise entitled, and, for the purpose in good faith of effectually executing and assuring their covenants and agreements in this behalf, each does hereby further covenant and agree, without other or additional consideration at any and all times upon the request or desire of the other, his or her heirs, assigns or devisees, to execute and deliver in due form of law, all deeds, releases or forms of conveyance, presented to said party, and, in the event of the

death of either party the survivor will upon notice thereof promptly execute, deliver and file a good and sufficient instrument in due form of law, releasing, renouncing and disclaiming all rights of dower or curtesy, as the case may be, and their legal and statutory share in and to the real and personal estate of the said deceased party.

14. Approval by Divorce Court. In the event that either spouse should hereafter institute or commence an action or proceeding for a divorce in the court or tribunal of any state or territory of the United States, or of any foreign country, whether it be on grounds alleged heretofore to have existed, this agreement not being intended to be construed as a condonation of such grounds, if any, or on grounds alleged to have hereafter come into being, the divorcing spouse shall apprise the said court or tribunal of this agreement and request the incorporation or the ratification hereof or reference hereto in the final decree or judgment that may be awarded by the said court or tribunal, in order that the provisions of said decree or judgment relating to the support and maintenance of the Wife shall be in conformity with the provisions hereof. In any event, nevertheless, whether or not such decree incorporates, ratifies or refers to this agreement, it is the intention of the parties that this agreement shall survive and shall not be merged in the decree, and shall be binding and conclusive on the parties henceforth.

15. Voluntary Execution. Each party acknowledges that this agreement has been entered into of his or her own volition, with full knowledge of the facts and full information as to the legal rights and liabilities of each, and that each believes the agreement to be reasonable under the circumstances.

16. Modification and Waiver. This agreement shall not be modified or annulled by the parties hereto except by written instrument, executed in the same manner as this instrument. The failure of either party to insist upon a strict performance of any provision of this agreement shall not be deemed a waiver of the right to insist upon a strict performance of such provision or of any other provision of this agreement at any time.

17. Governing Law. All matters affecting the interpretation of this agreement and the rights of the parties hereto and hereunder shall be governed by the laws of the District of Columbia.

18. Partial Invalidity. If any provision of this agreement is held to be invalid or unenforceable, all other provisions shall nevertheless continue in full force and effect.

19. Address of Parties. Each party shall at all times keep the other informed of his or her place of residence, and shall promptly notify the other of any change, giving the address of the new place of residence and telephone number.

20. Binding Effect. Except as otherwise stated herein, all provisions of this agreement shall be binding upon the respective heirs, next of kin, executors and administrators of the parties.

IN WITNESS WHEREOF, the parties hereto have signed and sealed this agreement, on the day and year hereinbefore written.

(Signed) Frances Charlotte Den (SEAL)
FRANCES CHARLOTTE DEN

(Signed) Alfred A. J. Den (SEAL)
ALFRED A. J. DEN

[Jurat]

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SCHEDULE A

| Name of Creditor | Service or Merchandise | Amount |
|---|---|---|
| Dr. John M. Fearing | Medical treatment of Wife | $160.00 |

SCHEDULE B

| | | |
|---|---|---|
| Lord & Taylor | Household linens, etc. | $ 42.40 |
| Franklin Simon | Clothing -- Laurence | 13.88 |
| Julius Garfinckel | Clothing | 33.92 |
| Woodward & Lothrop | Clothing -- Patricia | 23.64 |
| | Total (Schedule B) | $113.84 |

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[Filed April 22, 1966]

NOTICE OF TAKING ORAL DEPOSITION

To: Warren E. Magee, Esquire
1730 K Street, N. W.
Washington, D. C.

Attorney for Defendant

Please take notice that commencing at three P.M. on Thursday, April 28, 1966, at the office of Paul M. Rhodes, 612 Barr Building, 910 Seventeenth Street, N. W., Washington, D. C. plaintiff will take the deposition upon oral examination of the defendant, Alfred A. J. Den, before a Notary Public of the District of Columbia, for the purpose of discovery or for use in evidence, or both, pursuant to the Federal Rules of Civil Procedure.

/s/ Paul M. Rhodes
612 Barr Building
910 Seventeenth Street, N.W.
Washington, D. C. 20006
Attorney for Plaintiff

[Certificate of Service]

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[Filed May 2, 1966]

MOTION OF THE DEFENDANT TO STRIKE AND VACATE THE NOTICE FOR THE TAKING OF THE DEFENDANT'S DEPOSITION, OR TO CONTINUE THE TAKING OF THE DEFENDANT'S DEPOSITION

Comes now the defendant, by his attorney, and moves the Court to strike and vacate, or, in the alternative, to continue the taking of the Deposition of the defendant on the following grounds:

1. The Notice to take the Deposition of the defendant by the plaintiff was not served and was not authorized to be served by an Order of this Court, as required by the provisions of Rule 6(a) of the Federal Rules

of Civil Procedure, in that a Notice to take the defendant's Deposition was issued within twenty days after the filing of the Complaint and is forbidden unless authorized by an Order of this Court.

2. Defendant plans to file in this Court in this action a Motion to Dismiss the Complaint for failure to state a cause of action within the jurisdiction of the Court, an alternative Motion for Judgment on the pleadings, and an alternative Motion for Summary Judgment on the grounds that the plaintiff is not entitled to any of the relief prayed for and that the money payments sought have been paid, rendering the case moot, and that the plaintiff has failed to state a claim in accordance with law and within the jurisdiction of this Court.

3. Until the jurisdiction of the Court over the claim alleged in the Complaint has been adjudicated by the Court, plaintiff should not be permitted to take the Deposition of the defendant in this action.

4. In the interest of justice and in conserving the time of the Court and of counsel, in the very least, the taking of the Deposition of the defendant should be continued until after the Court acts on the Motions of the defendant attacking the Complaint and the jurisidction of this Court over the matters alleged in the Complaint.

5. For other grounds which will be asserted to the Court at the oral argument of this Motion.

Respectfully submitted,

/s/ Warren E. Magee
Attorney for Defendant

Warren E. Magee
1730 K Street, N. W.
Washington, D.C. 20006

Of Counsel:

Magee & Bulow
1730 K Street, N. W.
Washington, D. C. 20006

[Filed May 6, 1966]

## NOTICE OF TAKING ORAL DEPOSITION

To: Alfred A. J. Den, M.D.
The Savoy Apartments
1101 New Hampshire Avenue, N. W.
Washington, D. C.

Please take notice that commencing at 3:00 P.M. on Tuesday, May 10, 1966, at the office of Paul M. Rhodes, 612 Barr Building, 910 Seventeenth Street, N. W., Washington, D. C., plaintiff will take the deposition upon oral examination of the defendant, Alfred A. J. Den, before a Notary Public of the District of Columbia, for the purpose of discovery or for use in evidence, or both, pursuant to the Federal Rules of Civil Procedure.

/s/ Paul M. Rhodes
612 Barr Building
910 Seventeenth Street, N.W.
Washington, D. C. 20006
Attorney for Plaintiff

[Certificate of Service]

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[Filed May 6, 1966]

## OPPOSITION TO DEFENDANT'S MOTION TO STRIKE AND VACATE NOTICE OF THE TAKING OF THE DEFENDANT'S DEPOSITION OR TO CONTINUE THE TAKING OF THE DEFENDANT'S DEPOSITION

Plaintiff, by her attorney, opposes the granting of defendant's motion to vacate the notice of the taking of defendant's deposition, or to continue the taking of defendant's deposition, or to continue the taking of defendant's deposition until the disposition of jurisdictional questions which defendant proposes to raise by motions yet to be filed.

Defendant's motion to vacate the notice is directed to plaintiff's notice issued under date of April 22, for defendant's examination on April 28, 1966. Since this notice was superseded by plaintiff's notice of the taking of defendant's deposition issued on April 25, for defendant's examination on May 10, 1966, plaintiff will treat defendant's motion as though it were directed to the existing notice.

1. Plaintiff's notice of the taking of defendant's deposition was properly issued under the rules.

In urging that plaintiff's notice of the taking of defendant's deposition be vacated, defendant represents that the notice was not given in accordance with Rule 6(a) F.R.C.P. "in that a Notice to take the defendant's Deposition was issued within twenty days after the filing of the Complaint and is forbidden unless authorized by an Order of this Court."

That defendant's representation is factually inaccurate will be evident from an examination of the file.

The complaint was filed on April 1, 1966, an order appointing a special process server was signed that same day, and the complaint and summons were forthwith delivered by the Clerk to the special process server. Service of the summons and complaint was served on the defendant on April 11, 1966.

Plaintiff's notice of the taking of defendant's deposition was mailed on April 25, 1966, which was more than twenty days after the commencement of the action. Accordingly, the notice is in conformity with Rule 26, and there is no basis for vacating it.

2. Defendant's intentions of filing motions seeking the dismissal of plaintiff's action do not warrant the suspension of plaintiff's rights of discovery.

Plaintiff's attorney is informed and believes that the defendant is in the process of disposing of his medical practice and property with the intention of absenting himself from the District of Columbia for an indefinite period of time.

Accordingly, in the absence of assurances to the Court by defendant's counsel that defendant is not leaving the jurisdiction, plaintiff must object to any continuance in the scheduled taking of defendant's deposition.

It cannot be disputed that plaintiff and defendant have long been residents of the District of Columbia, that this is an action in personam, that defendant was personally served in the District of Columbia, and that defendant had breached his contract with plaintiff in an essential respect by failing to make any payments for her support for three months.

Whatever may be the merits of the motions defendant proposes to file in this proceeding, the interests of justice require that plaintiff not be delayed in proceeding with the defendant's examination, or with the speedy completion of other discovery proceedings, in order that this case may be certified to the ready calendar at the earliest possible date.

In the absence of any cited authority for the granting of defendant's extraordinary request, plaintiff moves that defendant's motion be denied.

/s/ Paul M. Rhodes
Attorney for Plaintiff
910 17th Street, N.W.
Washington, D.C. 20006

[Certificate of Service]

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[Received May 13, 1966]

MOTION TO DISMISS THE COMPLAINT, OR, IN THE ALTERNATIVE, FOR A SUMMARY JUDGMENT UNDER RULE 56 (FRCP)

Comes now the defendant, by his attorney, and moves this Honorable Court to Dismiss the Complaint for failure to state a claim or cause of action within the jurisdiction of this Court, and for further grounds in support of the Motion to Dismiss alleges:

1. Paragraph 3 of the Complaint alleges that the parties entered into an Agreement dated June 28, 1963 (Exhibit A to the Complaint) and by the provisions of that Agreement, paragraph 7 of the Complaint alleges

defendant is obligated to pay to plaintiff for her maintenance and support the sum of One Thousand Dollars ($1,000.00) on February 1, 1966 and the sum of One Thousand Dollars ($1,000.00) on March 1, 1966, but defendant has paid plaintiff nothing for her maintenance and support for February and March, 1966, or a total sum of Two Thousand Dollars ($2,000.00).

2. The Complaint on its face shows, as a matter of law, that the only sums due and owing to the plaintiff at the time the Complaint was filed were payments of $1,000.00 each for February and March, 1966, or a total sum of $2,000.00. Hence, the Complaint does not state a claim within the jurisdiction of this Court, which is limited to civil actions involving $10,000.00 or more.

3. The Complaint on its face further shows, in paragraph 6, that on March 5, 1965 plaintiff instituted an action against defendant in the District of Columbia Court of General Sessions (Case No. GS 4510-65), for judgment for defendant's arrearages in payments, and obtained on February 25, 1966 a judgment against the defendant for arrearages claimed for the months of January, 1965 to January, 1966, inclusive, in the sum of Seven Thousand Seven Hundred Dollars ($7,700.00), plus interest, which judgment was paid and satisfied by defendant on February 25, 1966. Thus, plaintiff has put in litigation the failure of defendant to make payments under the Agreement of June 28, 1963 and was required to assert all claims arising out of any such breaches of the Agreement, including the theory advanced in the Complaint in this civil action, C. A. No. 862-66, as stated in paragraph 11, and was required to demand judgment for all damages arising from a breach involving some twelve payments under the Agreement of June 28, 1963, and, having obtained a final judgment in that action awarding money damages in the sum of $7,700.00, plus interest, has rendered the issue and theory asserted in paragraph 11 of the Complaint res adjudicata and against the claim of the plaintiff in this regard.

4. And for other grounds which will be asserted at the oral argument on this Motion to Dismiss.

## ALTERNATE MOTION FOR SUMMARY JUDGMENT

In the alternative, defendant moves for summary judgment under Rule 56 (FRCP) on the pleadings and on the Affidavit of Counsel filed herewith, which is made a part of the Motion for Summary Judgment by reference, which show that there is no genuine issue as to any material fact and that the defendant is entitled to judgment as a matter of law, and for further grounds in support of this alternate Motion for Summary Judgment alleges:

1. The Complaint shows on its face, in paragraph 7, that only two One Thousand Dollar ($1,000.00) payments for maintenance, for February and March of 1966, or the total sum of Two Thousand Dollars ($2,000.00), was owed by the defendant to the plaintiff when Civil Action No. 862-66 was filed on April 1, 1966. As shown by the Affidavit of Counsel for the defendant, payment for the two installments due or the plaintiff in the sum of $2,000.00 have been paid to the plaintiff and have been retained by the plaintiff, rendering the action moot.

2. The claim based upon a breach of the contract of the Agreement of June 28, 1963 (Exhibit A to the Complaint) as stated in paragraph 11 of the Complaint and in the prayer of the Complaint for damages for breach of contract in the sum of Two Hundred and Fifty Thousand Dollars ($250,000.00) and costs, is untenable as a matter of law, as plaintiff is entitled only, in any proceedings which she brings under the Agreement of June 28, 1963, to obtain a judgment for monies due her under paragraph 2 of the Agreement, and not to anticipatory damages, as attempted to be alleged in the Complaint.

3. The Agreement of June 28, 1963 contains no provision which would accelerate any payments due to the plaintiff by the defendant because of any failure or failures on the part of the defendant to pay any of the installments for the support and maintenance of the plaintiff under paragraph 2 of the Agreement of June 28, 1963; hence there is no basis in fact or in law for awarding damages for the plaintiff for the sum of Two Hundred and Fifty Thousand Dollars ($250,000.00), particularly as

the death or remarriage of the plaintiff would terminate any obligation on the part of the defendant to make any further payments under paragraph 2 of the Agreement of June 28, 1963.

4. The Affidavit of Counsel also affirmatively shows that the defendant has also paid the plaintiff the $1,000.00 due her under paragraph 2 of the Agreement of June 28, 1963 for April, 1966, and a similar payment for May, 1966, and the further sum of $100.00 also, as provided for in the Agreement of June 28, 1963 and that said additional sums totalling $2,100.00 have been retained by the plaintiff.

5. Plaintiff is not entitled to any payments under the Agreement of June 28, 1963 as a matter of law other than those which have been paid to her, as set forth in the Affidavit of Counsel; hence judgment should be entered in favor of the defendant, as there is no genuine issue of fact here involved and defendant is entitled to a judgment in his favor as a matter of law.

6. And for such other and further grounds as will be presented to the Court on the argument of this Motion.

Respectfully submitted,

/s/ Warren E. Magee

/s/ Thomas G. Laughlin
1730 K Street, N. W.
Washington, D. C. 20006
Attorneys for Defendant.

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[Filed May 13, 1966]

## DEFENDANT'S STATEMENT OF MATERIAL UNDISPUTED FACTS UNDER LOCAL RULE 9(h) OF THIS COURT

The defendant states that the following are undisputed facts under Local Rule 9(h) of this Court:

1. Plaintiff filed a Complaint in this action on April 1, 1966. The Complaint alleges that the plaintiff and the defendant to this action executed an Agreement dated June 28, 1963, a copy of which is attached to the Complaint and marked Exhibit A.

2. After June 28, 1963 the plaintiff and the defendant were divorced.

3. On March 5, 1965 plaintiff instituted an action against the defendant in the District of Columbia Court of General Sessions (Case No. GS 4510-65), for judgment for defendant's arrearages in payments under the Agreement of June 28, 1963, paragraph 2.

4. On February 25, 1966 in the District of Columbia Court of General Sessions (Case No. GS 4510-65) plaintiff obtained a judgment against the defendant for arrearages for the months of January, 1965 to January, 1966, inclusive, in the sum of Seventy Seven Hundred Dollars ($7,700.00), plus interest, which judgment was paid and satisfied by defendant on February 25, 1966, and plaintiff's attorney has filed a Praecipe of Satisfaction of the judgment of February 25, 1966.

5. The total amounts claimed to be due by the plaintiff in the Complaint under the Agreement of June 28, 1963 were in the sum of $1,000.00 payable on February 1, 1966 and the sum of $1,000.00 payable on March 1, 1966 (Complaint, Par. 7).

6. In the action instituted by plaintiff against the defendant in the District of Columbia Court of General Sessions (Case No. GS 4510-65), plaintiff also sought additional damages in the form of punitive damages because of the failure of the defendant to pay the installments claimed to be due to the plaintiff from the defendant for the months January, 1965 to January, 1966, inclusive, under the Agreement of June 28, 1963. The Court of General Sessions directed a verdict in favor of the defendant on the demand of the plaintiff for punitive damages and no punitive damages were allowed.

7. Defendant has complied with all of the other provisions of the Agreement of June 28, 1963, as no claim of other breaches is alleged in this regard in plaintiff's Complaint.

8. Since the filing of the Complaint in this action, the defendant has paid to the plaintiff, and the plaintiff has retained such payments, the following sums under the Agreement of June 28, 1963, together with interest thereon to the date of each payment:

$1,000.00 in payment of the month of February, 1966
1,000.00 in payment of the month of March, 1966
1,000.00 in payment of the month of April, 1966
1,000.00 in payment of the month of May, 1966
100.00 in payment of child support,

under paragraph 3 of the Agreement of June 28, 1963.

9. The death or remarriage of the plaintiff would terminate all obligations of the defendant to the plaintiff under the Agreement of June 28, 1963.

10. As of this date no monies are due and owing from the defendant to the plaintiff under the Agreement of June 28, 1963.

11. The Agreement of June 28, 1963 contains no acceleration provision or any liquidated damages provision entitling the plaintiff to any damages for the delay in any payment or payments by the defendant to the plaintiff under paragraphs 2 and 3 of the Agreement of June 28, 1963.

12. As all monies due and payable by the defendant to the plaintiff under the Agreement of June 28, 1963 have been paid to the plaintiff, and have been retained by the plaintiff, the action is moot.

Respectfully submitted,

/s/ Warren E. Magee

/s/ Thomas G. Laughlin
1730 K Street, N. W.
Washington, D. C. 20006
Attorneys for Defendant.

[Filed May 13, 1966]

## AFFIDAVIT OF COUNSEL

DISTRICT OF COLUMBIA, SS:

Warren E. Magee, being first duly sworn, according to law deposes and says:

I am a member of the Bar of this Honorable Court and the attorney representing the defendant in the above-entitled civil action; I have personal knowledge of the facts set forth in this Affidavit, that such facts would be admissible in evidence and that I am competent to testify as to the matters and facts stated in this Affidavit in this action. On April 12, 1966 I forwarded to Paul M. Rhodes, Attorney for the plaintiff, by letter, the sum of $2,019.00, in payment of the monthly installments due from the defendant to the plaintiff under the Agreement of June 28, 1963 for the months of February and March, 1966, and an additional payment in the sum of $1,002.00 in full payment of the April, 1966 installment under the Agreement of June 28, 1963, including interest. I attach to this Affidavit a copy of my letter to Paul M. Rhodes of April 12, 1966 forwarding these payments as Exhibit 1. I received a letter dated April 14, 1966 from Paul M. Rhodes, acknowledging receipt of affiant's letter and the sums of $2,019.00 and $1,002.00. I attach a copy of this letter as Exhibit 2. On May 2, 1966 I forwarded to Paul M. Rhodes, Attorney for the plaintiff, $1,000.00 in payment of the May, 1966 installment under the Agreement of June 28, 1963 and an additional payment of $100.00 payable under the said Agreement of June 28, 1963 to the plaintiff. I attach to this Affidavit a copy of my letter to Paul M. Rhodes of May 2, 1966 as Exhibit 3. The payments of $1,000.00 and $100.00 have been retained by the plaintiff to date.

In the civil action which the plaintiff instituted on March 5, 1965 against the defendant in the District of Columbia Court of General Sessions (Case No. GS 4510-65) for judgment for defendant's arrearages in payments under the Agreement of June 28, 1963 for the months January, 1965 to

January, 1966 inclusive, plaintiff demanded punitive damages but this claim was denied by the District of Columbia Court of General Sessions on the ground that plaintiff was not entitled to any punitive damages and a judgment for the amount of the monies actually due, in the sum of $7,700.00, plus interest, was entered on February 25, 1966, which judgment was paid and satisfied by the defendant in full, and a Praecipe by the plaintiff's attorney was filed entering said judgment as paid and satisfied.

I state that no monies are now due and owing under the Agreement of June 28, 1963 from the defendant to the plaintiff under paragraphs 2 and 3 of the Agreement of June 28, 1963.

Further affiant sayeth not.

/s/ Warren E. Magee
Warren E. Magee

Subscribed and sworn to before me this 13th day of May, 1966.

/s/ Louise G. Burroughs
Notary Public, D. C.

My Commission Expires
September 30, 1970.

[Seal]

EXHIBIT NO. 1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

| | |
|---|---|
| FRANCES C. DEN, Plaintiff, v. ALFRED A. J. DEN, Defendant. | C. A. No. 862-66 |

April 12, 1966

Paul M. Rhodes, Esq.
910 17th Street, N. W.
Washington, D. C.

Re: Frances C. Den v. Alfred A. J. Den

Dear Mr. Rhodes:

Please be advised that this office now represents Dr. Alfred A. J. Den.

Our information is that in March of 1965 your client, Frances C. Den, instituted an action against Dr. Alfred A. J. Den in our General Sessions Court, in Case No. GS4510-65, to recover alleged arrearages in payments under an Agreement dated June 28, 1963 between Alfred A. J. Den and Frances C. Den.

On February 16, 1966 a judgment was entered in the General Sessions Court in the sum of $7,700.00, plus interest, in favor of Mrs. Frances C. Den, which judgment Dr. Den paid on February 25, 1966. I have in the file your receipt and praecipe dated February 24, 1966 noting a payment by Dr. Den of the judgment in the amount of $7,700 entered on February 16, 1966, together with interest and costs as paid.

Dr. Den brought in a cashier's check payable to Mrs. Frances C. Den in the sum of $2,019.00 in payment of the monthly installments due under the agreement of June 28, 1963, together with interest thereon to date. I am enclosing herewith this check which you will please credit in satisfaction of the payments due for February and March of 1966 under the agreement.

I informed Dr. Den that an additional payment was due for April, as paragraph 2(a) of the agreement provides that the monthly payments payable to Mrs. Den are payable on or before the 1st day of each month. Accordingly, Dr. Den obtained another cashier's check payable to the order of Mrs. Frances C. Den in the sum of $1,002.00, in full payment of the April installment, together with interest thereon to date. This check

likewise is enclosed, which you will please credit in satisfaction of the April installment due under the agreement of June 28, 1963.

I would appreciate your acknowledging receipt of this letter and the enclosed checks, which are more particularly described as follows:

Cashier's Check No. 216393 on the Riggs National Bank dated April 12, 1966, payable to the order of Mrs. Frances C. Den, in the sum of $2,019.00, and

Cashier's check No. L216394 on the Riggs National Bank dated April 12, 1966, payable to the order of Mrs. Frances C. Den, in the sum of $1,002.00.

Your prompt attention to this matter will be appreciated.

Yours very truly,

/s/WARREN E. MAGEE

Encls.
WEM:lgb

EXHIBIT NO. 2

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

| | |
|---|---|
| FRANCES C. DEN, Plaintiff, v. ALFRED A. J. DEN, Defendant. | C. A. No. 862-66 |

Law Offices
RHODES, SIMMS & PALMES
612 Barr Building
910 Seventeenth Street, N. W.
Washington, D. C. 20006

Telephone
296-4686

April 14, 1966

Warren E. Magee, Esq.
Magee & Bulow
308, Riddell Building
1730 K Street, N. W.
Washington, D. C., 20006

Re: Frances C. Den v. Alfred A. J. Den
Civil Action No. 862-66

Dear Mr. Magee:

This will acknowledge the receipt of your letter of April 12, 1966, enclosing cashier's checks of the Riggs National Bank of that date, in the sums of $2019.00 and $1002.00.

These checks are tendered by you in payment of the monthly installments due for the months of February, March and April, 1966, due under the agreement of June 28, 1963.

In view of the background of this case, I cannot accept these tendered payments as a waiver of the breach of the said contract, or as providing a basis for the dismissal of the pending suit.

With this understanding, I am prepared, on behalf of the plaintiff, to accept the tendered payments merely as payments in mitigation of the plaintiff's damages. I will hold these checks, and request your affirmance of the understanding under which they may be negotiated.

Very truly yours,

/s/ Paul M. Rhodes

EXHIBIT NO. 3

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

| | |
|---|---|
| FRANCES C. DEN, Plaintiff, v. ALFRED A. J. DEN, Defendant. | C. A. No. 862-66 |

May 2, 1966

Paul M. Rhodes, Esq.
612 Barr Building
910 17th Street, N. W.
Washington, D. C. 20006

Re: Den v. Den
C. A. No. 862-66

Dear Mr. Rhodes:

I am enclosing herewith Cashier's Check on the Riggs National Bank in the sum of $1,000 payable to the order of your client, Mrs. Frances C. Den, in payment of the May installment due under the Agreement of June 28, 1963.

I am also enclosing a Register Check on the Riggs National Bank in the sum of $100.00, also payable to Mrs. Frances C. Den under the Agreement of June 28, 1963.

These checks pay all of the installments due under this Agreement to date.

In regard to my letter of April 12, 1966 in which I forwarded you the installments payable under the above mentioned Agreement totalling $3,000.00, please be advised that these installments are to be credited only to the monthly payments which I set forth in that letter.

Yours very truly,

Encls.
WEM:lgb

/s/ WARREN E. MAGEE

[Filed July 19, 1966]

1

Washington, D. C.
May 17, 1966

The above-entitled matter came on for hearing on Motions before the HONORABLE JOSEPH C. McGARRAGHY, United States District Judge.

* * * * *

2

PROCEEDINGS

* * * * *

MR. RHODES: Your Honor, let me make this observation. I have been informed that the Defendant, who is a doctor, is in the process of disposing of his connections in the District of Columbia with intention of absenting himself from the jurisdiction.

I have since received a notice of an announcement that a Dr. Hashim has now taken over his practice, which is consistent with the information that I received. My view on opposing this extension of time would be quite different if Mr. Magee is in a position to assure the Court that his client, the Defendant, will be available in the jurisdiction for examination in a matter of another few weeks or a month.

THE COURT: What can you tell me?

MR. MAGEE: The problem is this: Dr. Den did sell his practice but he went into the Government service, Your Honor, and he is now in training in the Middle West. We may have a problem of rescheduling a date on this matter, because as I understand it —

THE COURT: Is he in the District now?

MR. MAGEE: Oh, no, no, he is in training in the Middle West, as I understand it, Your Honor. But the problem is still the same. We would

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have to find some day and place and time convenient to work it out and arrange. But I can't say I could bring the doctor back in a week. I don't know whether the Government would let him come here. We could

arrange to take the deposition there, if he wants it. This is a problem that is involved because the doctor is in Government service. I understand they are very anxious to have him. They want him to go to Viet Nam because they are very short of radiologists in this area. But I think I can tell the Court that I am sure that he will not be in Viet Nam within the next two weeks, if that is what counsel wants, to try to arrange a date, if the Court holds there is any jurisdiction in this action.

That is our situation. There has been no secrecy about this. This has been under consideration for a long time by the doctor.

* * * * *

[Certificate]

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[Filed May 18, 1966]

ORDER

This action coming on to be heard on the defendant's Motion for Extension of Time Within Which to Plead to the Complaint, and the defendant's Motion to Strike and Vacate the Notice for the Taking of the Defendant's Deposition, or to Continue the Taking of the Defendant's Deposition, and it appearing that no Order is required on the Motion for an Extension of Time Within Which to Plead to the Complaint because the defendant filed on May 13, 1966 a Motion to Dismiss the Complaint, Or, In the Alternative, For Summary Judgment Under Rule 56 (FRCP), and it appearing further to the Court that the Motion to Dismiss and the Motion for Summary Judgment raise questions concerning the jurisdiction of the Court, it is by the Court this 18th day of May, 1966

ORDERED, that the taking of the Deposition of the defendant by the plaintiff be suspended and continued until after this Court acts upon the defendant's Motion to Dismiss the Complaint, Or, In the Alternative, For Summary Judgment Under Rule 56 (FRCP).

/s/ Joseph C. McGarraghy
JUDGE

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[Filed May 23, 1966]

PLAINTIFF'S OPPOSITION TO MOTION TO DISMISS THE COMPLAINT, OR, IN THE ALTERNATIVE FOR A SUMMARY JUDGMENT UNDER RULE 56 FRCP

Plaintiff, by her attorney, opposes the granting of defendant's Motion to Dismiss the Complaint, or, in the alternative, for a Summary Judgment.

Defendant's motion appears to raise the following questions for consideration.

1. This Court lacks jurisdiction in a proceeding for equitable relief because the amount of the defaulted payments accrued at the date of the filing of the action was not more than $10,000.00.

2. Whether the defendant by his unilateral action in tendering to plaintiff the amount of the defaulted payments, after having been served with process in this action, can render plaintiff's action moot, notwithstanding her refusal to accept the tendered payments in waiver of defendant's breach of the contract.

3. Whether a judgment obtained by plaintiff (and satisfied by defendant) in an earlier suit in the District of Columbia Court of General Sessions, for arrearages in payments made by defendant during a period prior to the default in payments here complained of, is res judicata of plaintiff's assertion of any other claim arising out of the same contract.

Plaintiff respectfully submits that the defendant's contentions are without merit, under the authorities cited in the points and authorities hereto attached, and his motion must be denied.

/s/ Paul M. Rhodes
Attorney for Plaintiff

910 17th Street, N. W.
Washington, D. C. 20006
(296-4686)

[Certificate of Service]

[Filed May 23, 1966]

## AFFIDAVIT OF PLAINTIFF IN OPPOSITION TO MOTION TO DISMISS THE COMPLAINT OR FOR SUMMARY JUDGMENT

I, Frances C. Den, being first duly sworn, on oath depose and say that:

1. I am the plaintiff in the above-entitled action.

2. I am and have been dependent on the payments to be made by defendant under the agreement of June 28, 1963, in order to make the payments on my home, and meet the costs of maintaining the home, and routine living expenses.

3. The defendant failed and refused to provide me with either a sworn statement of his adjusted gross income, or a copy of his Federal income tax return for the year 1963, as provided for by par. 2(e) of the Agreement of June 28, 1963; that at my own expense I engaged the services of an attorney, Mr. Dennis Collins, and he obtained this information from defendant, as a result of which in October 1964 defendant paid me an additional amount which was owing by the terms of the said agreement by reason of the defendant's increased income.

4. The defendant failed and refused to provide me with the information as to his income (as identified in par. 3 above) for the year 1964, and this information was not provided until it was obtained for me by my attorney, Mr. Paul M. Rhodes, in the proceedings in the case, GS 4510-65 in the District of Columbia Court of General Sessions.

5. The defendant has never informed me of his changes in his places of residence as provided for by par. 19 of the Agreement of June 28, 1963.

6. The defendant has not kept in full force and effect the life insurance policy as provided for by par. 6 of the Agreement of June 28, 1963, and incorporates by reference the letter from the New England Mutual Life Insurance Company, dated April 20, 1966, attached hereto and marked "Exhibit 1".

7. I am informed, believe, and believing aver, that the defendant stated that if I succeeded in obtaining a judgment against him in my action GS 4510-65 in the District of Columbia Court of General Sessions, he would dispose of his practice and remove himself from the District of Columbia, and that I would never get another cent from him, and verily believe that it is the defendant's intention to follow this threatened course of action.

/s/ _____
Frances C. Den

Subscribed and sworn to before me this 19th day of May, 1966.

_____
Christine A. Katarski
Notary Public

[Seal]

EXHIBIT 1

# NEW ENGLAND
## Mutual LIFE Insurance Company
BOSTON MASSACHUSETTS

J. Hicks Baldwin, C.L.U.
George W. Graves, Jr., C.L.U.
General Agents

THE BALDWIN-GRAVES AGENCY
Woodward Building
Corner of 15th & "H" Street
Washington, D. C. 20005

Tel: 202-393-3211

April 20, 1966



Mrs. Alfred A. J. Den
4514 Brandywine Avenue, N.W.
Washington, D. C.

Re: Policy #1,939,631
Alfred Den, Ins.

Dear Mrs. Den:

We are writing you this letter in accordance with your telephoned request of this date.

The Home Office prepares and send notices directly from Boston and sends this agency the copies to be used as notices of overdue premiums if not paid at the end of the grace period. Since you received an original of the January 26, 1966 premiums, a copy was sent down to us to be used as an overdue, and should have been sent to you. We do not know why it was overlooked and not sent out and we hope it does not happen again, but due to human error sometimes things like this happen. This policy could not lapse and if a payment is overlooked and paid by use of automatic premium loan, it could be repaid at any time.

The two notices for these premiums on both policies go out from Boston the same day and therefore you should get them at the same time. Not receiving the one listed above prompted your call. We indicated at that time the premium had not been paid and that an automatic premium loan had been applied for. If you wish to pay this yourself now as you had indicated you might, your check for $162.09 will pay the January and remove the A.P.L. The April notice will reaching you shortly from Boston.

Sincerely,

Cashier

a



(EXHIBIT 1)

[Filed May 23, 1966]

PLAINTIFF'S DISAGREEMENT WITH DEFENDANT'S LOCAL RULE 9(h) STATEMENT OF UNDISPUTED FACTS

Plaintiff by her attorney denies the correctness of Defendant's Statement of Undisputed Facts under Local Rule 9(h), as set forth in defendant's numbered paragraphs, as follows:

4. In the course of the trial in the District of Columbia Court of General Sessions of the case GS 4510-65, defendant therein, Alfred A. J. Den, confessed judgment in the amount of the arrearages in payments claimed by plaintiff therein, Frances C. Den, as detailed in plaintiff's exhibit 3 in evidence therein, a copy of which is attached hereto marked, "Exhibit A".

5. Denied.

6. In the action GS 4510-65, plaintiff by her amended complaint filed therein on September 30, 1965, also sought exemplary damages against defendant for the willful and malicious acts on the part of the defendant, that the trial court directed a verdict for defendant on this issue, and entered therein a Statement of Proceedings and Evidence on this issue, a copy of which is attached hereto, marked "Exhibit B".

7. Denied.

8. Denied.

9. Denied; the contract of June 28, 1963 being relied on as to the terms and conditions thereof.

10. Denied.

11. Denied; the contract of June 28, 1963 being relied on as to the terms and conditions thereof.

12. Denied.

Respectfully submitted,

/s/ _____
Paul M. Rhodes
Attorney for Plaintiff

EXHIBIT A

| Month | Amount Payable | Amount of Payment | Unpaid Balance |
|---|---|---|---|
| 1965 | | | |
| January | $1,000 | $500 | $ 500 |
| February | 1,000 | 500 | 500 |
| March | 1,000 | 500 | 500 |
| April | 1,000 | 500 | 500 |
| May | 1,000 | 500 | 500 |
| June | 1,000 | 500 | 500 |
| July | 1,000 | 500 | 500 |
| August | 1,000 | 300 | 700 |
| September | 1,000 | 300 | 700 |
| October | 1,000 | 300 | 700 |
| November | 1,000 | 300 | 700 |
| December | 1,000 | 300 | 700 |
| 1966 | | | |
| January | 1,000 | 300 | 700 |
| | | TOTAL | $7,700 |

EXHIBIT B

## STATEMENT OF PROCEEDINGS AND EVIDENCE

On February 15, 1966, the first day of trial of the above-entitled cause, in order to maintain her claim for punitive damages, the plaintiff Mrs. Frances C. Den, called Mrs. Elizabeth W. Bell, who testified on direct and cross-examination as follows:

That she married the defendant, Alfred A. J. Den, following his divorce from the plaintiff; that thereafter she and the defendant consulted her lawyer, Mr. Leonard Melrod, concerning the possibility of obtaining a reduction in the amount of the payments to be paid by defendant to the plaintiff, Mrs. Frances C. Den, under his agreement with her dated June 28, 1963; that Mr. Melrod informed them that in his opinion there were no grounds upon which the defendant could obtain a reduction in his payments under this agreement.

That she and the defendant separated in December, 1964, and in the latter part of December, 1964, or early part of January, 1965, the defendant discussed with her the possibility of their being reconciled and in the course of this discussion informed her that he had found an attorney who would be able to obtain for him a reduction in the payments to be made to Mrs. Frances C. Den under the June 28, 1963, agreement; that he, the defendant, was going to reduce from time to time the amounts of his payments to Mrs. Frances C. Den, and that he would "wear her down" and she would "give in" with the result that he would be able to substantially reduce future payments to the plaintiff.

That no reconciliation was effected, and she and the defendant were thereafter divorced.

The plaintiff, Mrs. Frances C. Den, testified in her own behalf, without cross-examination by defendant's counsel, as follows:

That by reason of the failure of the defendant, Alfred A. J. Den, to pay her the amounts as provided for by her agreement with him dated June 28, 1963, (Plaintiff's Exhibit No. 1 in evidence) she had incurred legal fees and legal expenses which, as itemized, amounted to $2,023.52.

The defendant, Alfred A. J. Den, called as a witness by plaintiff under Rule 43, testified on direct examination, and without cross-examination by defendant's counsel, as follows:

That he executed the agreement with plaintiff dated June 28, 1963, (Plaintiff's Exhibit No. 1 in evidence) with the advice of counsel; that his adjusted gross income for the calendar year 1964 was $28,715.60; that his understanding of the terms of the June 28, 1963, agreement was that in the circumstances he was to pay plaintiff the sum of $1,000.00 per month, and that he had paid her during the months January 1965 to January 1966, inclusive, only the amounts shown in the column headed "Amount of Payment" in Plaintiff's Exhibit No. 3 in evidence.

Thereafter in the resumption of the trial on February 16, 1966, the defendant's testimony on direct and cross-examination was set forth in the reporter's official transcript of proceedings, filed herein.

/s/ Dewitt S. Hyde, Judge

Dated, this 18th day of March, 1966.

[Certificate of Service]

Washington, D. C.
May 31, 1966

The above-entitled matter came on for hearing on Motions before the HONORABLE JOSEPH C. McGARRAGHY, United States District Judge.

* * * * *

PROCEEDINGS

* * * * *

THE COURT: Gentlemen, I am going to rule now. I have given this matter a great deal of study.

You don't need to stand.

I have read all the papers in the case and I appreciate the arguments of counsel.

I am of the opinion, and I am constrained to hold — I use that word advisedly — that the Court is without jurisdiction. The Defendant's motion for summary judgment must be granted. Accordingly, the Plaintiff's motion for declaratory judgment must be denied.

I will sign an order accordingly.

MR. MAGEE: I will present an appropriate order, Your Honor.

(Whereupon at 11:35 a.m., the hearing on the motions was concluded.)

* * * * *

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[Filed June 3, 1966]

JUDGMENT

THIS ACTION coming on to be heard on the defendant's Motion to Dismiss the Complaint and for a Summary Judgment under Rule 56 F.R.C.P. and the plaintiff's Motion for a Declaratory Judgment under Rule 56 (F.R.C.P.) and plaintiff's Motion for Attachment Before Judgment, and upon consideration thereof, and it appearing that there is no genuine issue of fact to be submitted to the trial Court and that this

McG

Court lacks jurisdiction of this action, it is by the Court, this 2nd day of June, 1966,

McG ORDERED AND ADJUDGED that the plaintiff's Motion for Declaratory Judgment under Rule 56 (F.R.C.P.) and the plaintiff's Motion for Attachment before Judgment and Declaratory Judgment be, and they are hereby denied; and it is

FURTHER ORDERED AND ADJUDGED that the defendant's Motion for Summary Judgment under Rule 56 (F.R.C.P.) be, and the same is hereby granted, and judgment is entered in favor of the defendant; and the complaint be, and the same hereby is finally dismissed; and it is

FURTHER ORDERED, that the defendant's Motion to Dismiss is declared moot.

/s/ Joseph C. McGarraghy
DISTRICT JUDGE

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[Filed June 29, 1966]

NOTICE OF APPEAL

Notice is hereby given this 29th day of June, 1966, that Plaintiff, Frances C. Den hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 3rd day of June, 1966 against said Plaintiff

/s/ Paul M. Rhodes
Attorney for Plaintiff

Paul M. Rhodes

Copy to: Warren E. Magee, Esq.
730 K Street, N. W.
Washington, D. C.

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CASILLAS PRESS
921 Seventeenth Street, N.W.
Washington, D.C. 20006
347-5527

4-23

BRIEF FOR APPELLEE

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

NO. 20,382

---

FRANCES C. DEN,

*Appellant,*

v.

ALFRED A. J. DEN,

*Appellee.*

---

*APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA*

---



*Of Counsel:*
Magee & Bulow
1730 K Street, N. W.
Washington, D.C. 20006

WARREN E. MAGEE
THOMAS G. LAUGHLIN
1730 K Street, N. W.
Washington, D.C. 20006
*Attorneys for Appellee*

## COUNTERSTATEMENT OF QUESTIONS PRESENTED

Appellee states that the questions presented are:

1. Whether the District Court erred in dismissing the Complaint based upon an Agreement for lack of jurisdiction, where the Complaint alleged that only two payments were due and unpaid under that Agreement amounting to $1,000.00 payable on February 1, 1966 and $1,000.00 payable on March 1, 1966.

2. Whether the District Court committed prejudicial error when it granted the appellee's Motion for Summary Judgment for lack of jurisdiction and decided, therefore, that the Motion of the appellee to Dismiss the Complaint was moot.

3. Whether the District Court abused its discretion to appellant's prejudice when it continued the taking of the appellee's deposition until after the Court ruled upon appellee's Motions to Dismiss, or, in the Alternative, for a Summary Judgment.

## INDEX



## TABLE OF CASES



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*Cases chiefly relied upon are marked by asterisks.

## STATUTES AND TEXTS

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

NO. 20,382

---

FRANCES C. DEN,

*Appellant,*

v.

ALFRED A. J. DEN,

*Appellee.*

---

*APPEAL FROM THE UNITED STATES DISTRICT COURT*
*FOR THE DISTRICT OF COLUMBIA*

---

## BRIEF FOR APPELLEE

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### COUNTERSTATEMENT OF THE CASE

Appellee deems a Counter Statement of the Case necessary in order that the questions involved be properly presented to this Honorable Court for review.

Appellant states that the undisputed facts in this case are as set forth in appellee's Statement of Material Undisputed Facts under Local

Rule 9(h) of the court below (J.A.[1] 23-25), which we summarize as follows:

1. Appellant filed a Complaint below on April 1, 1966. The Complaint alleged appellant and appellee executed an Agreement dated June 28, 1963, a copy of which was attached to the Complaint and marked Exhibit A (J.A. 3, 24).

2. After June 28, 1963, appellant and appellee were divorced (J.A. 3, 24).

3. On March 5, 1965 appellant instituted an action against appellee in the District of Columbia Court of General Sessions (Case No. GS4510-65) for a judgment for appellee's arrearages in the payments under the Agreement of June 28, 1963, paragraph 2 (J.A. 4, 24).

4. On February 25, 1966, in the District of Columbia Court of General Sessions (Case No. GS4510-65), appellant obtained a consent judgment against appellee for arrearages for the months of January, 1965 to January, 1966, inclusive, in the sum of Seventy Seven Hundred Dollars ($7700.00), plus interest, which judgment was paid and satisfied by appellee on February 25, 1966, and appellant's attorney filed a Praecipe of Satisfaction of the judgment of February 25, 1966 (Complaint, par. 6, J.A. 4, 24).

5. The total amounts claimed to be due by appellant in the Complaint filed below and the only breach alleged in that Complaint under the Agreement of June 28, 1963 (Exhibit A) were $1,000.00 payable on February 1, 1966 and $1,000.00 payable on March 1, 1966 (Complaint, pars. 7, 11, J.A. 4, 5, 24).

6. In the action instituted by appellant against appellee in the District of Columbia Court of General Sessions (Case No. GS4510-65), ap-

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[1] J.A. refers to the Joint Appendix filed with the Brief for Appellant.

pellant also sought additional damages in the form of punitive damages because of the failure of appellee to pay the installments claimed to be due to appellant from appellee for the months from January, 1965 to January, 1966, inclusive, under the Agreement of June 28, 1963. The Court of General Sessions directed a verdict in favor of appellee on the demand for punitive damages and no punitive damages were allowed. Appellant appealed that portion of the judgment which denied appellant punitive damages to the District of Columbia Court of Appeals (J.A. 26-27, 39, 41-42).

7. No claim of other breaches is alleged in the Complaint (J.A. 3-6, 24).

8. Since the filing of the Complaint below, appellee paid to appellant, and appellant retained such payments, the following sums under the Agreement of June 28, 1963, together with interest thereon to the date of each payment:

$1,000.00 in payment of the month of February, 1966
1,000.00 in payment of the month of March, 1966
1,000.00 in payment of the month of April, 1966
1,000.00 in payment of the month of May, 1966
100.00 in payment of child support

under paragraph 3 of the Agreement of June 28, 1963 (J.A. 22-23, 25, 26-31).

9. Death or remarriage of appellant would terminate all obligations of appellee to appellant under the Agreement of June 28, 1963 (Exhibit A to the Complaint) (J.A. 6-15, 25). Death of appellee would terminate all payments ninety days thereafter (J.A. 12).

10. No monies are due and owing from the appellee to the appellant under the Agreement of June 28, 1963, as the payments claimed to be in default when the Complaint was filed were paid (J.A. 25).

11. The Agreement of June 28, 1963 (Exhibit A) contains no acceleration provision and no liquidated damages provision entitling appellant to any damages for the delay in any payment or payments by the appellee under the Agreement (J.A. 6-15, 25).

12. As all monies due and payable by appellant to appellee under the allegations of the Complaint and under the terms of the Agreement of June 28, 1963 (Exhibit A) have been paid to and retained by appellant, the action is moot (J.A. 25).

## Statement of Proceedings Below

After the filing of the Complaint, appellant filed a Notice for the taking of the deposition of the appellee (J.A. 16). Appellee moved to strike and vacate this Notice or to continue the deposition until appellee's Motion to Dismiss, or, an Alternative Motion for Summary Judgment, had been determined. (J.A. 16-17) On May 18, 1966 the court below entered an Order suspending and continuing the taking of the deposition of appellee until the Court acted upon appellee's Motion to Dismiss or appellee's Alternative Motion for Summary Judgment under Rule 56 (FRCP) (J.A. 33-34).

On May 13, 1966 appellee filed a Motion to Dismiss the Complaint, or, in the Alternative for a Summary Judgment under Rule 56 (J.A. 20-23). With this Motion appellee filed a Statement of Material Undisputed Facts under Local Rule 9(h) of the court below (J.A. 23-25) and an Affidavit of Counsel (J.A. 26-27). The Affidavit established that the District of Columbia Court of General Sessions in Case No. GS4510-65 denied appellant's claim for punitive damages and that the payments alleged to be due from appellee to appellant under the Agreement of June 28, 1963, together with payments due under that Agreement for the months of April and May, as well, had been paid to appellant and had been retained by appellant.

Appellant opposed the Motion to Dismiss and the Alternative Motion for Summary Judgment of Appellee (J.A. 34-35). With this Opposition appellant filed her own Affidavit, raising for the first time allegations that appellee did not furnish her with information and had not kept in full force and effect a life insurance policy under paragraph 6 of the Agreement of June 28, 1963 (J.A. 36-42).

The matter was heard before Judge Joseph C. McGarraghy on May 31, 1966, who ruled that the court was without jurisdiction; accordingly, appellee's Motion for Summary Judgment must be granted and appellant's Motion for Judgment must be denied (J.A. 43).

On June 3, 1966, the judgment was entered, holding that there was no genuine issue of fact to be submitted, that the court lacked jurisdiction over the action, therefore the court denied appellant's Motions for judgment and for attachment before judgment and declaratory judgment, granted appellee's Motion for Summary Judgment under Rule 56, finally dismissing the Complaint, and further ordered that appellee's Motion to Dismiss was moot (J.A. 43-44).

On June 29, 1966 appellant noted an appeal from the judgment of dismissal of June 3, 1966 (J.A. 44).

## SUMMARY OF ARGUMENT

The District Court did not err in granting appellee's Motion for Summary Judgment under Rule 56 for the reason that the Complaint failed to state a claim within the jurisdiction of the court because the Complaint on its face alleged a breach of a contract involving the non-payment of two payments due under that contract for February, 1966, in the sum of $1,000.00, and for March, 1966, in the sum of $1,000.00. The theory of the Complaint, because of the delay in the making of these payments, notwithstanding they were in fact paid, together with the payments under the contract due for the subsequent months of April and May, 1966, entitled the plaintiff to a judgment in the sum of $250,000.00 as damages

for breach of the contract, is untenable as a matter of law, and the court below properly dismissed such a Complaint.

The District Court did not commit prejudicial error in granting appellee's Motion for Summary Judgment and in finally dismissing the Complaint for lack of jurisdiction, and, because of this action, in holding that appellee's Motion to Dismiss was moot.

The District Court did not abuse its discretion to the prejudice of appellant in continuing the deposition of appellee until after the Court ruled upon appellee's Motions to Dismiss the Complaint, or in the Alternative, for a Summary Judgment under Rule 56.

## ARGUMENT

### I.

### The District Court Was Correct in Granting Appellee's Motion for Summary Judgment and in Dismissing the Complaint

The only breach alleged in the Complaint filed below is set forth in paragraph 3 thereof and reiterated in paragraph 11 thereof, that appellee did not pay two monthly installments, being $1,000.00 for the month of February, 1966 and $1,000.00 for the month of March, 1966. No other breaches of the Agreement of June 28, 1963 (Exhibit A) are alleged in the Complaint. (J.A. 3-5)

The theory of the Complaint is that the failure to make these two payments on time constituted a breach which entitled appellee to be paid all the payments in the future due under this contract, based upon the life expectancy of appellant of 23.5 years, in the sum of $250,000.00. Shortly after the Complaint was filed, appellee paid the two installments alleged to be due in paragraph 7 of the Complaint and also paid the installments amounting to $1,000 each for the months of April and May, 1966, under

the Agreement, together with all interest due thereon, and an additional payment of $100.00 payable under paragraph 3 of the Agreement of June 28, 1963. Appellant retained all of these payments.

The Complaint further showed that appellant had filed an action on the Agreement of June 28, 1963 in the General Sessions Court of the District of Columbia, and, on February 25, 1966 obtained a consent judgment against appellee for the full amount of the arrearages claimed for the months of January, 1965 to January, 1966, inclusive, in the sum of $7700.00, plus interest. This judgment was paid and satisfied by appellee and appellant's counsel filed a Praecipe entering the judgment as paid and satisfied. The General Sessions Court in this civil action denied the claim of the plaintiff for punitive damages. Appellant appealed that portion of the judgment of February 25, 1966 wherein the General Sessions Court directed a verdict in favor of appellee on the issue of punitive damages.

Subsequent to the filing of this appeal, the District of Columbia Court of Appeals, on September 20, 1966, decided the appeal of appellee in *Den v. Den,* No. 3986, ___ A.2d ___, and affirmed the judgment of the District of Columbia Court of General Sessions, directing a verdict on the issue of punitive damages in favor of appellee. In *Den* the Court of Appeals held (Slip Opinion, p. 2):

> It is the rule in this jurisdiction that punitive damages are generally not recoverable for breach of contract; but "in certain, narrowly defined circumstances, where a breach of contract merges with, and assumes the character of, a wilful tort, calculated rather than inadvertent, flagrant, and in disregard of obligations of trust punitive damages may be assessed." *Brown v. Coates,* 102 U.S. App. D.C. 300, 303, 253 F.2d 36, 39 (1958), 67 A.L.R. 2d 943.
>
> The circumstances of the instant case do not fit the narrow limits set forth in *Brown.* In *Brown* a broker defrauded his client, breaching his duty of trust. Here

there was evidence to suggest that the husband willfully and perhaps maliciously failed to comply with the separation agreement in an effort to "wear down" the wife and force her to agree to reduced payments; but if the husband did attempt to defraud the wife, his efforts were not successful.

While there are cases in this jurisdiction indicating that punitive damages may be allowed for breach of contract where the acts of the breaching party are malicious, wanton, oppressive or with criminal indifference to civil obligations, it appears that such acts must, as was said in *Brown*, merge with and assume the character of a willful tort. Such is not the case here. We think the present case is controlled by *Minick v. Associates Inv. Co.*, 71 App. D.C. 367, 110 F.2d 267 (1940), where a complaint alleged that the defendant secured possession of an automobile by giving a check for repairs and storage charges and then "willfully, wantonly, and maliciously" stopped payment of the check. It was held that the allegation was equivalent to alleging that defendant willfully, wantonly, and maliciously breached his contract, and that punitive damages are not allowable for breach of contract, regardless of defendant's motive.

Affirmed.

Appellant has filed a Petition with this Court seeking a special appeal from the judgment of the District of Columbia Court of Appeals in Case No. 3986.

Appellee filed a Motion to Dismiss the Complaint, or, in the Alternative, a Motion for Summary Judgment under Rule 56, on the ground that the Complaint fails to state a cause of action within the jurisdiction of the Court, as the Complaint shows that only $2,000.00 was owed by appellee to appellant when the Complaint was filed, and by Affidavits filed with the Motion for Summary Judgment, appellee further showed that the

$2,000.00 owed, as alleged in paragraphs 7 and 11 of the Complaint, had been paid, together with the $1,000.00 installment payable in April and the $1,000.00 installment payable in May, as well as the $100.00 payable under paragraph 3 of the Agreement. The Affidavit filed with appellee's Motion for Summary Judgment established that all of these payments made by appellee to appellant have been retained by the appellant. These Motions further pointed out that not only did the court lack jurisdiction because only $2,000.00 was involved, but that the case was moot because the sums alleged to be due had been paid to and retained by appellant, and that the issue of alleged breach of contract, based upon delayed payments of the monies due, was *res judicata* because of the decision in the case of *Den v. Den,* No. GS4510-65 in the District of Columbia Court of General Sessions involving the same Agreement of June 28, 1963 (Exhibit A to the Complaint, J.A. 3).

As the Complaint alleged, and this is the only breach set forth in the Complaint, that only $2,000.00 was due from appellee to appellant when the Complaint was filed, the court below lacked jurisdiction of this action, as $10,000.00 was not involved, and the ad damnum clause seeking money judgment for $250,000.00 did not confer jurisdiction upon the court below under the facts and circumstances alleged in the Complaint.

28 U.S.C.A., Sections 1331, 1332; D. C. Code, 1961 Ed., Suppl. V. 1966, Title 11, Sec. 11-961.

In *Minick v. Associates Investment Co.* (1940), 71 U.S. App. D.C. 367, 110 F.2d 267, the Complaint charged that the defendants wilfully, wantonly and maliciously stopped payment of a check and because of such wilfull and malicious breach of the contract and the withholding of the payment of money due, the plaintiff was entitled to an award of punitive damages. In denying punitive damages for the wilfull, wanton and malicious stopping payment of a check, this Court held (pp. 267-268):

The complaint charges that the defendants "wilfully, wantonly, and maliciously" stopped payment of the check. This is the equivalent of saying - wilfully, wantonly, and maliciously breached its contract to pay the charges. But it is well settled that no punitive damages will be allowed for breach of contract, regardless of defendants' motive. Plaintiff is confined to interest as the only recovery for the breach in excess of actual loss. Loudon v. Taxing Dist., 104 U.S. 771, 26 L. Ed. 923; Young v. Main, 8 Cir., 72 F.2d 640; Baumgarten v. Alliance Assur. Co., C.C., 159 F. 275; Williston on Contract, Sec. 1340; Restatement of Contracts, Sec. 342. Even in a tort case, except perhaps where the complaint sets out circumstances of extreme aggravation, punitive damages are not allowable. Ballard v. Spruill, 64 App. D.C. 60, 74 F.2d 464; 15 Am. Jur., Damages, Sec. 278. Here, the actual damages recoverable being for a sum within the exclusive jurisdiction of the Municipal Court, the District Court of the United States had no jurisdiction, and a mere ad damnum clause will not confer it. North American Trans. Co. v. Morrison, 178 U.S. 262, 20 S. Ct. 869, 44 L. Ed. 1061. The cause was properly dismissed.

Affirmed.

The appeal of appellant from the judgment of the General Sessions Court directing a verdict on the issue of punitive damages in favor of the appellee has been decided and the District of Columbia Court of Appeals has affirmed that action, following *Minick*.

*Den v. Den*, No. 3986, supra.

The Complaint alleged that the Agreement of June 28, 1963, under a situation far more favorable to the appellant, that is, wherein appellant contended that some twelve payments totalling $7700.00 had not been paid under that Agreement, has been litigated in the District of Columbia Court of General Sessions (Case No. GS4510-65). In the General Sessions

case, as here, appellant claimed additional relief in the nature of punitive damages against the appellee for late payments. The Court of General Sessions denied the claim for punitive damages and awarded appellant judgment against the appellee for the arrearages claimed for the months of January, 1965 to January, 1966, inclusive, in the sum of $7700.00, plus interest, which judgment was paid and satisfied by appellee on February 25, 1966 and so entered of record. Appellant was required in GS4510-65 to litigate all of her causes of action, including the cause of action attempted to be alleged in paragraph 11 of the action below, hence the matter is *res judicata* and against the theory of the appellee.

As stated in 30 Am. Jur., Judgments, Sec. 363, p. 403:

> A final judgment on the merits by a court of competent jurisdiction is conclusive as to the rights of their parties and their privies and as to them constitutes an absolute bar to a subsequent action involving the same claim, demand and cause of action.

Notes 15 and 16 to the text cite numerous cases in support of this well established principle of law.

In the classic case of *Cromwell v. Sac County*, 94 U.S. 351, 24 L.Ed. 195, the Supreme Court stated (p. 197):

> In considering the operation of this judgment, it should be borne in mind, as stated by counsel, that there is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any

other admissible matter which might have been offered for that purpose. Thus, for example; a judgment rendered upon a promissory note is conclusive as to the validity of the instrument and the amount due upon it, although it be subsequently alleged that perfect defenses actually existed, of which no proof was offered, such as forgery, want of consideration or payment. If such defenses are not presented in the action, and established by competent evidence, the subsequent allegation of their existence is of no legal consequence. The judgment is as conclusive, so far as future proceedings at law are concerned, as though the defenses never existed. The language, therefore, which is so often used, that a judgment estops not only as to every ground of recovery or defense actually presented in the action, but also as to every ground which might have been presented, is strictly accurate, when applied to the demand or claim in controversy. Such demand or claim, having passed into judgment, cannot again be brought into litigation between the parties in proceedings at law, upon any ground whatever.

To the same effect is the landmark decision in *State of Oklahoma v. State of Texas*, 266 U.S. 70, 41 S. Ct. 420, wherein the Supreme Court said (p. 422):

> The general principle, applied in numerous decisions of this court, and definitely accepted in Southern Pacific R. R. v. United States, 168 U.S. 1, 48, 49, 18 Sup. Ct. 18, 42 L. Ed. 355, is, that a question of fact or of law distinctly put in issue and directly determined by a court of competent jurisdiction as a ground of recovery or defense in a suit or action between parties sui juris is conclusively settled by the final judgment or decree therein so that it cannot be further litigated in a subsequent suit between the same parties of their privies whether the second suit be for the same or a different cause of action. As was declared by Mr. Justice Harlan, speaking for the court in the case cited on

page 49 of 168 U.S., on page 27 of 18 Sup. Ct. (42 L. Ed. 355):

> "This general rule is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for, the aid of judicial tribunals would not be invoked for the vindication of rights of person and property, if, as between parties and their privies, conclusiveness did not attend the judgments of such tribunals in respect of all matters properly put in issue and actually determined by them."

The principle of *res judicata* has been applied by this Court in domestic relations cases.

*Smith v. Smith* (1961), 109 U.S. App. D.C. 367, 288 F.2d 151.

In *Smith* this Court held (p. 154):

> We think that the Florida court determined the question of whether the agreement was made by that court part of its divorce decree, and therefore subject to modification by it, or whether the agreement was not part of the decree and so the modification related only to sanctions to be applied by the court. Plaintiff's seventh exception to the Master's report, quoted supra, clearly shows that that question was raised in the Florida court and that it was determined adversely to her. Under the doctrine of res judicata, plaintiff can not be permitted to relitigate that precise issue in the District Court here; she is bound by the Florida determination that the agreement itself was modified.

The record in this case shows, including the Affidavit of Counsel for appellee, that all monies due the appellant under the Agreement of June 28, 1963, have been paid in full, with all interest thereon, to appellant and appellant has retained these payments. The action is now moot because of the acceptance by the appellant of all payments due by the appellee under the Agreement of June 28, 1963 and appellant is estopped to further

prosecute this action. One cannot accept payments and also prosecute an action under untenable legal grounds concerning that same Agreement, including prosecuting matters on appeal, and this Court has so held.

*Harris v. Harris* (1937), 67 U.S. App. D.C. 85, 89 F.2d 829.

*Harris* involved an almost identical situation as that involved here. In *Harris* a divorce was involved as well as payments of alimony to the wife. After the appeal was filed in *Harris*, appellee filed a Petition to Dismiss the Appeal on the ground that the appellant wife had received alimony awarded to her by the decree appealed from and the wife had accepted these payments. Under the circumstances, in *Harris v. Harris*, this Court held (pp. 86-87):

> After the appeal was docketed, and while pending in this court, the husband, as appellee, filed a petition herein to dismiss the appeal upon the ground that since the entering of the appeal the wife had received from him the payment of the alimony awarded to her by the decree appealed from, that he had paid her each and every installment of the alimony when due under the order of the court and that she had accepted the same. He contended that appellant, by demanding and receiving the alimony aforesaid, had waived her right to appeal from the decree.
>
> The wife filed an answer to this petition admitting that she had demanded and received the alimony in question as stated by appellee, but denied that she was thereby estopped from prosecuting her appeal. The issue thus raised has been argued and considered by the court.
>
> We are of the opinion that the petition to dismiss the appeal must be sustained upon the grounds set out by appellee.
>
> It is held by the authorities without exception, so far as we can discover, "where a divorce is granted against the wife to whom an award of alimony is made, that, by

> accepting the alimony, she is precluded from taking and prosecuting an appeal from the decree of divorce." 2 Am. Jur. Sec. 219, p. 981.

* * *

The appeal, therefore, is dismissed.

To the same effect is *Union Provision & D. Corp. v. Thomas J. Fisher & Co.*, (D.C. App. 1946), 49 A.2d 85.

Where money, which is the subject matter of the action, has been paid, legal proceedings involving that same money cannot be continued thereafter, either in the Trial Court or in the Appellate Court. Even in criminal cases, this principle has been applied and the Supreme Court of the United States has held that where the questions become moot, a Federal Court lacks jurisdiction to decide any question involved because that would amount to the giving of an advisory opinion, which is not within the jurisdiction of a Federal Court. In dismissing a Petition for Writ of Certiorari, after it had been granted, in a criminal contempt case where a defendant had served the sentence before the Supreme Court decided the constitutional issues involved in the jail sentence, in *St. Pierre v. United States* (1943), 319 U.S. 41, 63 S. Ct. 911, that Court held (p. 42 and p. 911):

> On the argument it was conceded that petitioner had fully served his sentence before certiorari was granted. We are of opinion that the case is moot because, after petitioner's service of his sentence and its expiration, there was no longer a subject matter on which the judgment of this Court could operate. A federal court is without power to decide moot questions or to give advisory opinions which cannot affect the rights of the litigants in the case before it. United States v. Alaska S. S. Co., 253 U.S. 113, 115, 116, 40 S. Ct. 448, 64 L. Ed. 808, and cases cited; United States v. Hamburg-Amerikanische Packet-Fahrt-Actien Gesellschaft, 239 U.S. 466, 475-477, 36 S. Ct. 212, 216, 60 L. Ed. 387.

II.

**The District Court Committed No Prjudicial Error When It Granted Appellee's Motion for Summary Judgment in Deciding, Therefore, That Appellee's Motion to Dismiss Was Moot.**

The Complaint here alleged as the only breach that appellee failed to pay a February installment of $1,000.00 and a March installment of $1,000.00 under the Agreement dated June 28, 1963. Appellant claimed damages in the sum of $250,000.00, representing the total amount of all payments due her should she live her normal expectancy of 23.5 years.

Appellee paid appellant the two installments involved in the Complaint for February and March, 1966, totalling $2,000.00, and also paid the installments due under the Agreement for April and May of 1966 and the $100.00 payment due under paragraph 3 of the Agreement. Accordingly, appellee filed a Motion to Dismiss the Complaint for failure to state a cause of action within the jurisdiction of the Court, and also filed an Alternative Motion for Summary Judgment, supported by an Affidavit of Counsel, establishing that the monies claimed to be due under the Complaint, together with the monies due and payable for April and May under the Agreement of June 28, 1963 had been paid to the appellant and had been retained by her. The District Court properly granted appellee's Motion for Summary Judgment because the Affidavit brought into the record matters which were not alleged in the Complaint and correctly held that appellee's Motion to Dismiss, therefore, was moot.

Rule 12(b) controls this situation and states, when matter outside of the pleadings is considered by the Court, a Motion for Summary Judgment should be granted rather than a Motion to Dismiss.

The question raised by appellant in this regard was before this Court in *Richardson v. Rivers* (1964), 118 U.S. App. D.C. 333, 335 F.2d 996. In *Richardson*, a Motion accompanied by an Affidavit and a Memorandum was filed to dismiss the Complaint, or, in the alternative, for Summary

Judgment under Rule 56 (p. 997). The District Court entered an Order reciting the filing of the Motion of the defendant to Dismiss the Complaint, or, in the alternative, for a Summary Judgment, and ordered that the Motion to Dismiss would be granted and that the action would be dismissed. No action was taken on the alternative Motion for Summary Judgment. This Court in affirming, because the Motion was supported by an Affidavit and Memorandum, determined that the Motion for Summary Judgment should have been granted for failure to state a cause of action rather than a Motion to Dismiss. In this regard in *Richardson* this Court held (p. 998):

> We proceed first to determine the nature of the order entered by the District Court, i.e., whether it is in fact the granting of a motion to dismiss the complaint for failure to state a cause of action, or the granting of summary judgment. We are of the opinion that it is the granting of summary judgment. Fed. R. Civ. P. 12(b) provides in part:
>
> "If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56 * * * *."

In this case the affidavit of the Secretary of the Parole Board presented "matters outside the pleading" and, thus, the motion should be treated as one for summary judgment. Fowler v. Curtis Publishing Co., 78 F. Supp. 303, 304 (D.D.C. 1948), affirmed, 86 U.S. App. D.C. 349, 182 F.2d 377 (1950). In the words of the court in Dinwiddie v. Brown, 230 F.2d 465, 467 (5th Cir.), cert. denied, 351 U.S. 971, 76 S. Ct. 1041, 100 L. Ed. 1490 (1956):

> "It is clear that although the order of dismissal stated that it was granted on a motion to dismiss for failure to state a claim upon which relief could be

> granted, the district court's failure to exclude affidavits and exhibits offered in support of the motion converted it into a motion for summary judgment."
>
> Larsen v. American Airlines, 313 F.2d 599, 601 (2d Cir. 1963); Suckow Borax Mines Consolidated v. Borax Consolidated, Ltd., 185 F.2d 196, 205 (9th Cir. 1950). Cf. Owen v. Kronheim, 113 U.S. App. D.C. 81, 82-83, 304 F.2d 957, 958 (1962); Wm. J. Kelly Co. v. Reconstruction Finance Corp., 172 F.2d 865, 866 (1st Cir. 1949). See Ellis v. Carter, 291 F.2d 270, 275 (9th Cir. 1961); United States v. Lot 800, 169 F. Supp. 904 (D.D.C. 1959).

In regard to conclusory allegations of the Complaint attempting to confer jurisdiction on the Court where the facts disclose a failure to state a cause of action, this Court held (p. 999):

> Moreover, in our opinion, appellant's mere conclusory assertions of discrimination would not be sufficient to withstand appellees' motion for summary judgment. Cf. Harris v. Settle, 322 F.2d 908 (8th Cir. 1963); Childs v. Pegelow, 321 F.2d 487 (4th Cir. 1963); Dunn v. Gazzola, 216 F.2d 709 (1st Cir. 1954); Ortega v. Ragen, 216 F.2d 561 (7th Cir. 1954), cert. denied, 349 U.S. 940, 75 S. Ct. 786, 99 L. Ed. 1268 (1955); McGuire v. Todd, 198 F.2d 60, 63 (5th Cir.), cert. denied, 344 U.S. 835, 73 S. Ct. 44, 97 L. Ed. 649 (1952); United States ex rel., Hoge v. Bolsinger, 211 F. Supp. 199 (W.D. Pa.), affirmed, 311 F.2d 215 (3rd Cir. 1962), cert. denied, 372 U.S. 931, 83 S. Ct. 878, 9 L. Ed. 2d 735 (1963); Morgan v. Sylvester, 125 F. Supp. 380, 390 (S.D. N.Y. 1954), affirmed, 220 F.2d 758 (2d Cir.), cert. denied, 350 U.S. 867, 76 S. Ct. 112, 100 L. Ed. 768 (1955).

Moreover, appellant has not shown that she is in any way prejudiced by the District Court's granting of a Motion for Summary Judgment based in part upon Affidavits bringing in undisputed facts not set forth in the Complaint. Even if the court below were in error and should have

granted a Motion to Dismiss rather than a Motion for Summary Judgment, this is no ground for reversal.

*Richardson v. Rivers*, supra.

A similar situation arose in *Moffett v. Commerce Trust Co.* (C.C.A. 8, 1951), 187 F.2d 249. In *Moffett*, appellant contended it was error to dismiss the Complaint for failure to state a claim upon which relief could be granted because the Court had before it an Alternative Motion for Summary Judgment, with supporting Affidavits, and also had before it Opposing Affidavits. The District Court in *Moffett* dismissed the Complaint for failure to state a claim upon which relief could be granted and declined to pass on the Motion for Summary Judgment. In affirming the District Court, notwithstanding this situation, the Court of Appeals held (p. 249):

> One other contention of plaintiff may be noticed. Defendants filed motions to dismiss the action on various grounds, one being the failure of the complaint to state a claim upon which relief could be granted, and also in the alternative for summary judgment. Both parties filed numerous affidavits and exhibits in support of and in opposition to the motion for summary judgment. It is now contended that since the District Court permitted the parties to file these affidavits and exhibits it was error to dismiss the complaint for failure to state a claim on which relief could be granted. Rule 12(b) of the Rules of Civil Procedure, 28 U.S.C.A., is relied on in support of this contention. The rule provided that if, on a motion asserting failure to state a claim upon which relief can be granted, matters outside the pleadings are presented and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided by Rule 56, which provides for the procedure on motions for summary judgment. The District Judge declined to pass on the motion for summary judgment and granted the

> motion to dismiss. We are unable to see that this action which is clearly within the power of the court has resulted in any prejudice to the plaintiff.

As appellant has shown no prejudice by the granting of the Motion for Summary Judgment, the judgment of the District Court should be affirmed.

## III.

### The District Court Did Not Abuse Its Discretion to Appellant's Prejudice When It Continued the Taking of Appellee's Deposition Until After the Court Ruled Upon Appellee's Motions to Dismiss, or, in the Alternative, for Summary Judgment.

The District Court continued the taking of the deposition of the Appellee until after the Court ruled on the Appellee's Motions to Dismiss the Complaint, or, in the Alternative, for Summary Judgment. Obviously the District Court took this action because it did not want a deposition taken in a case in which the Court lacked jurisdiction or in a case where the Complaint failed to state a cause of action upon which the relief prayed for could be granted. Appellant now asserts that this continuance is an abuse of discretion. Appellant alleges no facts to establish that she was prejudiced in any way by this action.

No prejudice resulted to appellant in continuing the deposition until after appellee's Motions to Dismiss the Complaint, or, in the Alternative, for Summary Judgment were disposed of by the District Court. In fact, such a continuance was in the best interests of justice, as it conserved the time of the witness, counsel and the Court, as such a deposition would be mere surplusage, particularly when a Motion to Dismiss or for Summary Judgment is granted for failure to state a cause of action or for lack of jurisdiction. In situations similar to that posed in this case, where there is a hearing pending on the sufficiency of a Complaint, discovery proceedings have been stayed until after the issues raised by a

Motion to Dismiss or a Motion for Summary Judgment are disposed of by the Court.

*Sogmore Realties v. Twentieth Century-Fox Film Corp.* (D.C. N.Y. 1954), 15 F.R.D. 496.

## CONCLUSION

This case presents a typical case of extended litigation and harassment in a domestic relations matter, notwithstanding that the happily remarried husband has paid all of the monies due and owing to the divorced wife under an Agreement entered into prior to the divorce, dated June 28, 1963. Appellee husband, now in Government service, is undergoing training, as the record shows, for the purpose of serving his country in Viet Nam as a radiologist (J.A. 32-33). Here his divorced wife prosecuted an appeal after having received the full benefits of a judgment in her favor in excess of Seventy Seven Hundred Dollars ($7700.00), because of the denial to her of punitive damages, which denial has been affirmed on appeal. The divorced wire further has noted an appeal from the dismissal of a Complaint where she seeks to recover actually $2,000.00 which sum has been paid on the untenable theory because of the two months' delay in payment she is entitled to a judgment for accelerated damages in the sum of $250,000.00, notwithstanding that appellant's death, appellant's remarriage or appellee's death terminates all future payment obligations to appellant under the Agreement involved.

Under the allegations of the Complaint the court below properly granted appellee's Motion for Summary Judgment and dismissed the Complaint. The action of the District Court was proper and should be affirmed.

Respectfully submitted,

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REPLY BRIEF OF APPELLANT

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,382

FRANCES C. DEN,

*Appellant,*

v.

ALFRED A. J. DEN,

*Appellee.*

Appeal from the United States District Court
for the District of Columbia



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# INDEX



## TABLE OF CASES



## STATUTES AND TEXTS



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* Asterisk denotes case chiefly relied upon.

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,382

FRANCES C. DEN,

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ALFRED A. J. DEN,

*Appellee.*

Appeal from the United States District Court
for the District of Columbia

## REPLY BRIEF OF APPELLANT

### I. APPELLEE'S COUNTERSTATEMENT OF THE CASE

Appellee erroneously represents (Appellee's Brief, p. 1) that:

> Appellant states that the undisputed facts in this case are as set forth in Appellee's Statement of Material Undisputed Facts under Local Rule 9(h) of the court below . . .

Appellant has not so stated. To the contrary, Appellant filed a statement of her disagreement with certain of the facts stated by Appellee (JA 39) and also filed her affidavit in opposition (JA 36), which, under the District Court rule 9(h) prevents Appellee's statement of facts as being deemed admitted.

Illustrative of the confusion injected by Appellee's counterstatement of the case is his paragraph 10 (JA 25; Appellee's Brief, p. 3) in which he represents that "As of this date no monies are due and owing from the defendant to the plaintiff under the Agreement of June 28, 1963."

The amounts of the monthly payments to be paid by Appellee are geared to his adjusted gross income (JA 7, par. 2(b)) and under the terms of the contract of the parties this amount is determinable on the basis of Appellee's Federal income tax return, or other evidence to be provided to Appellant not later than April 30 of each year (JA 8, par. 2(e)) Appellee has never voluntarily provided this information (JA 36), and until it is provided, Appellant has no means of knowing what monies are due and owing. Appellee's failure to disclose this information permits the inference to be drawn that the amounts tendered were less than the amounts to which Appellant was entitled.

Further, at the time that Appellee made his purported statement of facts, he had defaulted in making the premium payments on the life insurance policy (JA 38) which he had undertaken to maintain in full force by the terms of his contract (JA 11, par. 6) which default Appellant also considers a material breach of the contract and for which there is no adequate remedy at law.

Appellee's quoted statement of purported facts creates the erroneous impression that the tender of the defaulted monthly payments, made after the suit was filed in the District Court and Appellee had been served with process, operated to cure the breach of contract and render the case moot. This is not so. While Appellee's failure to make any payments for Appellant's support constituted a total breach of the very essence of the contract which precipitated the action (JA 5, par. 11) the affidavit of Appellant (JA 36) enumerates various other breaches, including the Appellee's failure to keep the insurance in force. These various breaches could not be cured by a tender of only the amounts of the defaulted monthly payments.

Similarly, in his paragraph 8 (JA 25, 39; Appellee's Brief, p. 3) referring to the tender after suit was filed, of the defaulted monthly payments, appellee states that appellant has retained the tendered payments. Appellant, however, advised Appellee of her refusal to accept the belatedly tendered payments as a waiver of the breaches of the contract (JA 30), and the payments were not retained by Appellant, but are held by her attorney, as property of the Appellee, under the attachment before judgment issued in this case by the trial court (JA 2, Docket entries, May 23, 27, 1966).

By reason of the foregoing, the major thrust of Appellee's argument lacks factual support in the record.

## II. ARGUMENT

Appellee has failed to discuss the cited cases or to address himself to the primary question as to whether the trial court had jurisdiction of Appellant's prayer for specific performance — equitable relief, but instead focuses attention on the earlier action at law between the parties in the District of Columbia Court of General Sessions, urging that the judgment entered therein is *res judicata* of the action thereafter brought in the United States District Court for the District of Columbia. [1]

Appellant's action in the General Sessions Court was for a money judgment for the amount of arrearages in monthly payments owing under the parties contract of June 28, 1963. The compensatory judgment demanded by Appellant and the judgment confessed therein by Appellee, was for the amount of the arrearages in the monthly payments for the months January 1965 to January 1966, inclusive (JA 4, par. 6).

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[1] Appellee also cites cases bearing on the right to recover punitive damages in breach of contract cases. Appellant deems it unnecessary to discuss these cases, since punitive damages have not been sought in the pending case.

Thus, the action of the General Sessions Court in entering judgment for the period ending January, 1966, could not be *res judicata* of claims which had not accrued at the time of the entry of that judgment.

The case of *Cromwell* v. *Sac County*, 94 U.S. 351, 24 L. Ed. 195, cited and relied on by Appellee as the leading, classic case, notes the distinction to be made between the effect of a judgment as a bar against the prosecution of a second action upon the same claim or demand, and a subsequent action on a new or different claim, stating:

> But where the action between the parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered . . . the inquiry must always be as to the point or question actually litigated and determined in the original action; not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action.

In *Wardman-Justice Motors* v. *Petrie*, 59 App. D.C. 262, 39 F.2d 512, 69 A.L.R. 648, this Court pointed out that in the two actions there must be not only identity of subject matter, but also of the cause of action, so that a judgment in a former action does not operate as a bar to a subsequent action where the cause of action is not the same, although each action relates to the same subject matter, and that where the two actions rest upon different states of facts, a judgment in one is no bar to the maintenance of the other.

The sentence in 30-A Am. Jur., Judgments §363, p. 403, which follows the partial quotation in Appellee's brief makes the same distinction clearly made by this Court in the *Wardman-Justice* case, *supra*.

Appellee's argument on this point is in conflict with his argument challenging the jurisdiction of the District Court to enter judgment for damages for a total breach of the support contract. In advancing the

jurisdictional argument Appellee contends that Appellant may only sue for the amounts of the defaulted monthly payments, as they accrue. This is precisely what Appellant did in her prior action in the General Sessions Court, and the judgment entered in that Court was only for the amounts accrued and owing through the month of January, 1966.

Accordingly, there is no basis in law, under the facts to support the contention that a judgment for amounts owing for an earlier period is *res judicata* of claims thereafter arising under the same contract.

Neither *Harris* v. *Harris*, 67 U.S. App. D.C. 85, 89 F.2d 829, nor any of the other cases relied on by Appellee, stand for the principle that Appellant's collection of the amount of the judgment confessed by Appellee in the earlier case is inconsistent with or a bar to Appellant's right to proceed against Appellee by reason of his later acts and omissions.

Addressing himself only to the question of the jurisdiction of the District Court to entertain this case as an action at law for damages, in an amount alleged to be in excess of $10,000 for a "total breach" of contract (JA 5-6), Appellee's argument seems to be that as a matter of law there cannot be a total breach of such a contract, equating this to an installment promissiory note that does not contain a "hastening" clause, or provision for liquidated damages, by reason of which, notwithstanding the total breach of the contract, Appellant's damages must be asserted, piecemeal, from month to month, as the breach of contract continues. Appellant would only observe that no authority has been cited to support this novel contention that damages for breach of a contract for maintenance and support are not governed by the same body of law that applies to the breach of any other contract.

Finally, Appellee characterizes Appellant's refusal to go away and starve quietly as "harassment in a domestic relations matter, notwithstanding the happily remarried husband has paid all of the monies due

and owing" (Appellee's Brief, p. 21). First, as noted above, even as of the date of dismissal of the action by the trial court, Appellee had not paid all of the monies due and owing under the contract. Secondly, if Appellee is being harassed, he may bring the harassment to a prompt conclusion simply by observing the obligations assumed by his formal agreement.

Appellee has now remarried for the second time since he and Appellant were divorced (JA 5, par. 8; JA 41) and it is manifestly unreasonable for him to expect Appellant to forego her right of support, well-earned by more than 22 years of marriage in deference to financial obligations which Appellee may have assumed toward his after-acquired wives.

## III. CONCLUSION

Appellant's action was within the jurisdiction of the trial court, it was error to summarily dismiss it, the action is not *res judicata*, and the dismissal should be reversed and the case remanded for further proceedings.

Respectfully submitted,

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